81-2389

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

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ALEXANDER L. STEVAS,
CLERK

Asar M. Stepak, Appellant

v.

Rutgers Medical School-
a Division of the University
of Medicine and Dentistry of
New Jersey; the Board of
Trustees of the University
of Medicine and Dentistry
of New Jersey; the Department
of Higher Education of the
State of New Jersey and the
State of New Jersey; jointly,
severally, and/or in the
alternative,
Appellees

ON APPEAL FROM THE NEW JERSEY STATE SUPREME COURT

JURISDICTIONAL STATEMENT

Asar M. Stepak
Appellant, Pro Se
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QUESTIONS PRESENTED

1. Whether the "Medical and Dental Education Act of 1970", N.J.S.18A:64G-1 et seq., hereafter referred to as the "Act", is repugnant to the Federal Constitution and violative of the federal statutes, 42 U.S.C. 1981, 1983,1985, 1986, 1988, 2000(c) et seq., 2000(d) and 20 U.S.C. 1681, in vesting broad administrative powers in the University of Medicine and Dentistry of New Jersey which "shall be deemed to be public and essential governmental functions necessary for the welfare of the State and the people of New Jersey" and which has been construed as vesting in the University of Medicine and Dentistry of New Jersey broad administrative control over its employees and admission of students such that administrative policies and admission choices based on race are not subject to judicial process and which divests student applicants palpably alleging discrimination and/or presenting genuine issues of material facts on the basis of race, color, sex, or national origin of a trial de novo in a court of law, and which, in turn, places Rutgers Medical School, a Division of the University of Medicine and Dentistry of New Jersey

behind a veil immune from judicial scrutiny in implementation of its administrative policies and admission choices on the basis of race and/or national origin?

2. Does 42U.S.C. 2000(d) and 20 U.S.C. 1681 preclude legislative enactment divesting an individual of a trial de novo in a court of law who palpably alleges on the part of a Federally Funded Institution violations of the Equal Protection Clause of the 14th Amendment to the Constitution and/or discrimination based on sex? As both Federal Statutes, 42 U.S.C. 2000(d) and 20 U.S.C. 1681 imply a right of private remedy, can it be said that the federal right to private remedy precludes State statutory enactment repealing private remedy or limiting review to that of administrative proceedings?

3. As it appears that a major reason for the Act's passage was the Civil Rights Act of 1964 and the provisions as set forth in 42 U.S.C. 2000 (c) et seq., does 42 U.S.C. 2000c-8 specifically preclude the divesting by the "Act" of an individual's access to a trial de novo in a court of law?

4. As the University of Medicine and Dentistry of New Jersey encompasses all medical and dental schools in the State of New Jersey and the surrounding State schools generally

show preference to their in-State applicants, and as in passage of the "Act" the State has declared medical education as "necessary to the welfare of the State and people of New Jersey", does the "Act"'s divesting of a rejected in-State student applicant of a private remedy deprive that individual of property or liberty interests subject to the Due Process Clause of the 14th Amendment to the Constitution?

5. Is the "Act" which grants certain priviledges to Rutgers Medical School in its admission choices special in character because it favors one segment of the population over another and violative of the Equal Protection Clause of the 14th Amendment to the Constitution because of its special character?

6. Can the "Act" which places discrimination behind a veil immune from judicial scrutiny as prohibited by the Federal Constitution and Statutes be considered as serving a compelling State interest?

7. Can the "Act" which places discrimination behind a veil immune from judicial scrutiny as prohibited by the Federal Constitution and Statutes be considered as reasonably related to some object or purpose?

8. Does the "Act" violate the Equal Protection Clause of the 14th Amendment to the Constitution by depriving rejected applicants of the University of Medicine and Dentistry of New Jersey equal access to a trial de novo with that of rejected applicants of other schools within the State?

9. Can academic decision making be relegated to a public agency? Does the relegation of academic decision making to a federally funded public agency deprive a rejected applicant of his right to private remedy under 42 U.S.C. 2000(d) and 20 U.S.C. 1681?

Following are questions not directly challenging the validity of the "Act":

10. Does a rejected medical school applicant have standing to challenge racial admissions practices of a medical school if as a result of academic processes or practices being palpably alleged as having been discriminatory to the applicant the applicant receives a numerical ranking below the minimal prerequisite required for admission? Can the discriminatory impact or injury as is palpably alleged by the applicant deprive him of his standing? Isn't that injury which divests appellant of his standing to acquire that which he seeks in a court of law injury justiciable in a court of law?

11. Are the equality provisions as set forth by the Equal Protection Clause of the 14th Amendment to be construed to mean that equality is simply equality in numbers?

12. Under the Equal Protection Clause, does a racial quota have to be an overt fixed and rigid quota in order to be judicially cognizable as having the deleterious effect of foreclosing one class of individuals from competing with all other individuals on the basis of race? Does the mere fact that the annual number of minority students Appellees accepted each year varied only slightly and was not fixed defeat appellant's contention that the Appellees relied on a racial quota, albeit a slightly varying one, and that students were foreclosed from competing for all available seats on the basis of race?

13. Are the invidious class and racial affirmative action policies of a singular medical school admissions committee judicially cognizable regardless of State Statute giving effect to the contrary?

14. Does the appellant who palpably alleges discriminatory practices on the part of the University of Medicine and Dentistry of New Jersey, a federally funded institution, have a right to private remedy

under the federal statutes,42 U.S.C. 2000(d), 2000(c) et seq., and 20 U.S.C. 1681?

The following are procedural questions:

15. Was it violative of "Due Process" to grant Summary Judgement in appellees' favor without the court giving the appellant sufficient notice that the appellees' had met their burden and that additional evidence or reasons would be necessary to defeat appellees' motion?

16. Was it violative of "Due Process" to grant Summary Judgement to appellees prior to the actual disclosure of evidence that would have been relied upon by the trier of fact?

17. Was grant of Summary Judgement to the appellees prior to the appellant's being able to present material issues in opposition an unconstitutional denial of appellant's access to the courts?

18. Was the State court's grant of reinstatement of appellees' pleadings after a two year lapse in failing to provide discovery to be followed by Summary Judgement in appellees' favor a denial of procedural due process rights of the appellant when reinstatement was granted at a time subsequent to the extended discovery period having expired and discovery having not been further permitted by the court and where evidentiary material

was purposefully being witheld by the appellees and was required by the appellant to defeat appellees' Summary Judgement motion?

19. Did the appellees gain any unjustifiable advantage over the appellant for having failed to provide discovery and by reinstating their pleadings after the discovery period had been concluded?

20. Although the appellant may have the initial burden of presenting evidence in support of his claims, can he be reasonably considered under the Due Process provisions of the 14th Amendment as having additional burden in engaging in the very exercise of baring that burden?

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OPINIONS BELOW

Appellant's affidavit containing a summary of his April 14th, 1977 meeting with Dr. Taft, chairman of the admissions committee, the April 24th, 1978 Order of the trial court dismissing appellees' pleadings for failure to answer interrogatories, the trial court judgements of Oct. 27th, 1980, and Nov. 18th, 1980 granting appellees' motions for reinstatement and summary judgement, respectively, the judgement of the Appellate Div. of the State Court entered Jan. 8th, 1982 and judgement of the State Supreme Court entered on March 22nd, 1982 are contained in the Appendix, hereto.

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

The final judgement of the Supreme Court of the State of New Jersey refusing to review this matter on Petition for Certification was entered on March 22nd, 1982. On May 11th, 1982, timely Notice of Appeal to this court was submitted for filing in both the State Supreme Court and Appellate Div. of the State Court.

This case concerns the constitutionality of the State Statute known as the "Medical and Dental Education Act of 1970", hereafter

referred to as the "Act", which as construed by the State Court vests broad administrative control in the University of Medicine and Dentistry of New Jersey over its employees and in the admission of students. In addition, the "Act" has been construed as divesting rejected student applicants, palpably alleging discrimination based on race, color, sex, or national origin and/or presenting genuine issues of material facts, of a trial de novo in a court of law. In so far as the impact of the "Act" allows Rutgers Medical School, a Division of the University of Medicine and Dentistry of New Jersey, to implement administrative policies and admission choices on the basis of race and/or national origin and to serve as prosecutor and judge in its administrative proceedings concerning any contested rejection by a student applicant on grounds of discrimination, the "Act" is repugnant to the federal constitution and violative of the federal statutes, 42 U.S.C. 1981, 1983, 1985, 1986, 1988, 2000(c) et seq., 2000(d) and 20 U.S.C. 1681 as it places discrimination prohibited by the Federal Constitution and Statutes behind a veil immune from judicial scrutiny.

Notwithstanding there were raised substanstial constitutional questions in

addition to those directly challenging the validity of the "Act", the jurisdiction of this court over the appeal was invoked under 28 U.S.C. 1257(2), Prudential Ins. Co. v. Cheek, 259 U.S. 530, 547.

CONSTITUTIONAL AND STATUTORY PROVISIONS THIS CASE INVOLVES

The 14th Amendment to the United States Constitution provides in pertinent part:

> ...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 42 U.S.C. 1981 provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Title 42 U.S.C. 1981 provides:

> Every person who, under color of any statute, ordinance, regulation, customs, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Title 42 U.S.C. 1985, 1986, see Appendix, 22a.

Title 42 U.S.C. 1988 provides in pertinent part:

> ...In any action or proceeding to enforce a provision of section 1981,1982,1983,1985, and 1986 of this Title, Title IX of Public Laws 92-318, or Title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Title 42 U.S.C. 2000(c) et seq., provides in pertinent part: see 2000c-4(b), 2000c-8 below.

Title 42 U.S.C. 2000c-4(b) provides:

> In determining whether to make a grant, and in fixing the amount thereof and the terms and conditions on which it will be made, the Secretary shall take into consideration the amount available for grants under this section and the other applications which are pending before him; the financial condition of the applicant and the other resources available to it; the nature, extent, and gravity

of its problems incident to desegregation; and such other factors as he finds relevant.

Title 42 U.S.C. 2000c-8 provides:

> Nothing in this subchapter shall affect adversely the right of any person to sue for or obtain relief in any court against discrimination public education.

Title 42 U.S.C. 2000(d) provides:

> No person in the United States shall on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Title 20 U.S.C. 1681 provides in pertinent part:

> ...No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance...

New Jersey State Statute, 18:64G-1 et seq., known as the "Medical and Dental Education Act of 1970", provides in pertinent part:

> 18A:64G-3, There is hereby established in the Department of Higher Education the "College of Medicine and Dentistry of New Jersey".* The exercise by the

* On Dec. 10, 1981, the State Legislature redesignated the College of Medicine and Dentistry of N.J.,(CMDNJ), the University of Medicine and Dentistry of New Jersey, (UMDNJ).

powers conferred by this act in the presentation and operation of a program of medical and dental education shall be deemed to be public and essential governmental functions necessary for the welfare of the State and the people of New Jersey.

STATEMENT OF CASE

Appellant is the son of Polish immigrants who immigrated to the United States in 1948. Neither of his parents obtained formal education nor could speak, write, or understand the English language. Appellant was born in Nov., 1950 and raised in a household in which the Yiddish language was spoken exclusively. He did not begin any instruction in the English language until he entered school. Up until the age of 17, appellant lived with his family on a small farm in a poverty stricken area on Grubb Rd., Newfield, N.J., where the majority of residents were Black and of minority origin. In addition to having devoted much of his time to chores such as tending chickens and some livestock, the cultural deprivation of appellant's youth was furthered by economic hardship and in that the majority of neighboring residents, like himself, were either functionally illiterate and/or culturally and educationally deprived.

Having grown up in an area of impoverished minorities, appellant developed a special sensitivity to the cultural and economic obstacles confronting minorities which has enabled him throughout the years to establish close and rewarding relationships with members of the minority community. Thus, cognizant of the need for doctors in impoverished areas, his career objective was to practice medicine in an impoverished area where the need for his skills would be greatest.

Since the time of his youth, appellant worked hard supporting his education and career objectives while at the same time contributing to the financial well-being of his parents. Thus, it could be said, that not unlike many minority members who pulled themselves out of the ghetto, appellant had demonstrated the ability and perseverance necessary to overcome disadvantage.

In June 1973, appellant graduated Cum Laude from New York University with a Bachelor of Arts degree in Chemistry. As part of his undergraduate curriculum, he completed all courses required for admission to Rutgers Medical School. On or about September 30th, 1974, he properly applied to Rutgers Medical School, a Division of the University of

Medicine and Dentistry of New Jersey, UMDNJ, for admission as a member of the 1975-1976 first year class. At the time of his application he was a resident of the State of New Jersey and resided at 1792 E. Walnut Rd., Vineland, N.J. In appellant's application for admission he disclosed the facts of his cultural deprivation and national origin. Prior to his application he completed the Medical College Admission Test and scored a 715 on the science section which ranked higher than 98% of all other students taking the exam nationwide and was more than 70 points higher than the mean science MCAT score achieved by the 1975 entering class at Rutgers Medical School. Appellant's score on the Math and Verbal sections of the exam were higher than 95% and 83% respectively of the scores achieved by all other students taking the exam nationwide. Further, appellant's grade point average compiled at New York University where he had enrolled in some of the school's most rigorous laboratory and advanced courses, was equal to the mean grade point average achieved by members of the '75-'76 first year medical school class of Rutgers. In addition to excelling academically, appellant was an

active participant in many extracurricular and medicine related activities including the Bristol Pre-Med Society where he demonstrated his desire for helping the chronically ill and disabled.

To sum up, even though appellant had encountered substanstial cultural, developmental, and educational barriers as a child and in later years, the credentials he presented for admission to Rutgers Medical School were, nevertheless, equal to or above that achieved by the '75-'76 entering class.

At the time appellant received notice of rejection for admission to the Medical Program he was unaware of any specific grounds for rejection nor of the existence of a special remedial program for minority students. He did not become aware of the special minority remedial program nor of the grade point averages and MCAT scores of the '75-'76 first year class until the summer of '76 as revealed in that year's AAMC publication.

On April 14th, 1977 the appellant met with Dr. Taft, Chairman of the Admissions Committee, (Appendix, 4a), to discuss the reason for his rejection. During that review the appellant became aware that he was denied equal treatment in the admission ranking process on the basis of race. As a result,

excluding the racial factors considered by the Admissions Committee, applicants presenting substanstially lesser credentials than appellant were ranked higher. Furthermore, Dr. Taft indicated that granting appellant's application special consideration as a minority applicant would have been justified but because of his race he was automatically excluded from equal consideration in the admission ranking process. Considering that the number of minority students accepted each year varied only slightly, it was clear that the medical school reserved a specific percentage of its class exclusively for minority students. Thus, appellant's application for admission was not considered on an individual or equal basis with all other applicants and appellant was foreclosed from competing for all available seats on the basis of race. Because of discriminatory factors being relied upon in the rankings, appellant's final ranking below the minimal prerequisite for admission was, therefore, the result, not the cause, of his exclusion.

In June of 1977 appellant commenced an action in the Law Division as opposed to the Appellate Div. of Superior Court of N.J. seeking judgement against the defendants ordering that he be immediately admitted

as a full time student with all the rights privileges attendant thereto and be paid for compensatory and punitive damages. As stated by appellant's former attorney, Mr. Jeffrey I. Baron, in his April 11th, 1978 affidavit, the appellees acknowledged receipt of interrogatories propounded by appellant on Dec. 12th, 1977. By letter dated Dec. 21st, 1977 appellees agreed to submit answers to interrogatories and all parties agreed that deposition would be taken subsequent to the actual submission of answers to interrogatories. The time permitted by court rules for answers to interrogatories expired on Feb.11th,1978. In his affidavit Mr. Baron asserts he discussed overdue answers to interrogatories with appellees' counsel but, still, no answers were provided. Pursuant to R4:23-5(a), the pleadings filed by the appellees were stricken on April 24th, 1978, (App., 6a). The time which appellees may move to have their answer reinstated and for responding to interrogatories had expired on or about May 24th, 1978. On or about June 1978, the time for discovery was extended an additional 90 days. Still, throughout this period answers to interrogatories were not forthcoming,

thus, appellees conceded liability in this matter.

In Dec. 1979 appellant failed to receive proper notification of a scheduled trial date which resulted in a temporary and inadvertant dismissal of this action. During and prior to this period the appellant had sought the assistance of the Legal Ethics Committee in order to establish potential improprieties on the part of attorneys giving past attention to this matter and appellees' actual liability for legal costs incurred as a result of their inordinate delays. On May 30th, 1980 the dismissal was promptly vacated when appellant had moved for an entry of default against appellees.

On June 16th, 1980, the Honorable Richard S. Cohen signed an order denying entry of default against appellees and permitted an additional 30 days for appellees to respond to interrogatories. However, to grant relief to answer interrogatories after the expiration of the discovery period resulted in an injustice to the appellant since the court did not allow the appellant further discovery and the previous agreement of the appellees to submit to oral deposition was not upheld. In July 1980 appellees did submit somewhat vague and incomplete answers to interrogatories and in view of the above

stated facts appellant had no court authority to seek further clarification of those answers.

On Aug. 8th, 1980, return date of motion filed by appellees for summary judgement, the Hon. C. John Stroumtsos denied appellant's oral request for an extension of the discovery period to permit the taking of depositions and clarification of answers to interrogatories in opposition to appellees' motion. Since the period for discovery could not be extended, due to the excessive delays in the proceedings, appellant did not have court authorization and could not elicit, therefore, information from the appellees in opposition to their motion. Being that appellant was clearly prejudiced by the appellees' delays in responding to interrogatories and disobedience of the discovery rules and in that the preliminary evidence indicated, in spite of the limited discovery, that the appellees maintained a minority quota and had discriminated against appellant in foreclosing his application from competing for all available seats on the basis of race, in opposition to appellees' motion, appellant filed his own motion for summary judgement, returnable Sept. 19th, 1980. Appellant's motion was premised upon

the fact that the appellees could not show that appellant was not entitled to the relief requested in his complaint and that the burden of proof was on the appellees since their failure to respond to interrogatories and discovery had been flagrant and contumacious, and deprived appellant of information in support of his claims in addition to having incurred substanstial costs and inconvenience to appellant. On Sept. 19th, 1980, Judge Stroumtsos granted appellees' motion for summary judgement only because appellant's papers in opposition were inexplicably misplaced. The appellant advised the court that he had mailed his papers 15 days prior to the return date.

On Oct. 10th, 1980, Judge Stroumtsos acknowledged receiving appellant's papers and, thus, vacated his previous judgement granting summary judgement to the appellees and heard arguments on appellees' motion for reinstatement. Even though more than two years had passed since appellees' pleadings were stricken and appellant was clearly prejudiced by such delay and appellees had still not provided fully responsive answers to interrogatories, Judge Stroumtsos granted appellees' motion for reinstatement for reason, as stated in his Oct. 27th, 1980

order, "this matter involves issues of public importance as to the admission policies of a public agency which should be resolved after full and fair opportunity for explication of facts",(App., 8a). The ruling of the Judge was unusual in that by reinstating appellees' pleadings at a time when discovery was no longer available to the appellant the Judge had not only ruled that the "Medical and Dental Education Act of 1970" was constitutional in its divestiture of appellant's right to trial de novo but, also, he had done quite the opposite of promoting a full and fair explication of the facts in sanctioning appellees' delays and violations of court procedures which was clearly prejudicial to the appellant. After having reinstated appellees' pleadings, Judge Stroumtsos advised the parties their respective motions for summary judgement would be heard on Oct. 24th, 1980 and had given the parties additional opportunity to submit affidavits only. The taking of depositions was not ordered by the court nor consented to by the appellees.

On Oct. 24th, 1980, Judge Stroumtsos heard argument on both the appellant's and

appellees' motions for summary judgement. Briefly in support of his argument the appellant indicated that his background was similiar to that of minority students who Rutgers favored but that he was denied equal consideration in the admission ranking process and that in spite of his having overcome educational and cultural barriers the credentials he presented for admission were nevertheless equal to or above that of non-minority students who were accepted. Furthermore, appellant had presented evidence that Rutgers reserved a specific percentage of its class exclusively for minority students by virtue of the fact the number of minority students accepted each year varied only slightly and that the school had maintained a minority remedial program to promote retention. Also, was the fact that appellees had admitted in their pleadings to having relied upon racial factors in their selection of students. Appellees' argument appears to have been based on the premise that since appellant was ranked below a prerequisite numerical value required for admission he could not be considered as having been discriminated against. Also, presented was the affidavit of Ms.

Mary Green who was not a member of the admissions committee and whose testimony as to whether the Admissions Committee followed those procedures it had set for itself could not be considered as being based on personal knowledge. Having heard the arguments of the parties and having acknowledged the findings of fact presented by the appellees and having disregarded the facts in dispute presented by the appellant and without providing the appellant opportunity to present additional evidence and legal argument or to amend his complaint, and attributing no significance, whatsoever, to the appellees' hinderance of appellant's presentment of his cause of action and appellant's preclusion from cross examining appellees' witnesses and drawing information from alleged participants in the contested action, Judge Stroumtsos granted Summary Judgement in favor of the appellees. The grant of summary judgement would clearly be erroneous were it not for the court's ruling sustaining the constitutionality of the "Medical and Dental Education Act of 1970" which deprived appellant of any right to a trial de novo and deemed it sufficient that the administrative record below be only based on substanstial evidence.

On Oct. 24th, 1980, appellant's motion was filed in the Appellate Div. requesting leave to appeal the Oct. 27th, 1980 order of the trial court granting appellees' motion for reinstatement. On Nov. 18th, 1980, Judge Stroumtsos signed the order granting appellees' motion for summary judgement and recapitulating his oral decision of Oct. 24th, 1980, (App.,10a). On Jan. 21, 1981, the Appellate Div. denied appellant's motion for leave to appeal the Oct. 27th, 1980 Order but granted appellate an additional 45 days to appeal the Nov. 18th, 1980 Order. In order to expedite the disposition of this action, appellant sought leave to appeal the Oct. 27th, 1980 Order to the State Supreme Court as review by the Appelate Division had apparently been protracted by its Jan. 21st, 1981 determination. On April 8th, 1981, Judge Allcorn, P.J.A.D., signed an Order removing the 45 day limitiation for filing Notice of Appeal in response to appellant's motion for an extension of time which was filed by appellant for reason stated in his Jan. 27th, 1981 affidavit and since he was seeking leave to appeal the Jan. 21st, 1981 Order of the Appelate Div. to the State Supreme Court. On April 15th, 1981, leave to appeal was denied by the State Supreme Court thus reverting consideration of all

issues to the Appellate Div.

The matter was submitted December 23rd, 1981 before Judges Michels, McElroy, Coleman of the Appellate Div. who on Jan. 8th, 1982 affirmed without opinion the judgement of the trial court,(App.,13).

On Mar. 22nd, 1982, the State Supreme Court denied appellant's petition to review the ruling below. In so far as the decision of the State Supreme Court was premised upon the constitutionality of the "Medicine and Dental Education Act of 1970", hereafter referred to as the "Act", and that Appellant was not considered as having presented any substanstial constitutional questions in the lower courts other than his challenge to the validity of the "Act", the decision of the State Supreme Court not to review the rulings below amounts to an affirmance of the lower court and constitutionality of the "Act", and, therefore, would be the decision reviewable by this court, Tumey v. Ohio, 273 U.S. 510, 515, (App.,15).

For reason of the procedural difficulties stemming from appellees' failure to provide discovery, specific language challenging the constitutionality and validity of the "Act" may appear tangential in the record in so far as the procedural violations of the

appellees prohibited by the 14th Amendment to the Constitution were a major focus of the proceedings. However, there can be no doubt that the procedural violations of the appellees were unanticipated and that the appellant's cause of action in the trial court rested upon his challenge to the constitutionality of the "Act", and as the Superior Court-Law Division maintained jurisdiction to adjudicate the matter after having determined that the administrative record below did not require supplementation or further proceedings, there can be little or no doubt that it was the constitutionality of the "Act" and constitutionality of admission laws and policies of a State Administrative Body based upon their impact of depriving a citizen's access to the courts that was to be considered by the trial court, Dahnke-Walker Milling Co. v. Bondurant, 257 U.S.282. If it were not the constitutionality of the "Act" and admission policies/laws of a public agency that was considered and sustained by the trial court, then either the trial court would have lacked jurisdiction to hear the matter or the State Supreme Court would be obligated to grant Petition for Certification because of the far over-reaching departure from the usual course of judicial proceedings of the trial court.

Rule 2:2-3(a) of the Rules Governing the Courts of the State of New Jersey provides in pertinent part:

> (a)...appeals may be taken to the Appellate Division as of right...;(2) to review final decisions or actions of any state administrative agency or officer...

And as was established in Pascucci v. Vagott, 71 N.J. 40, 53 (1976), an appeal of a state administrative agency, in accordance with N.J. State Court Rules must be taken in the first instance in the Appellate Div., (Also see appellees' brief, Point III, App., 18a) unless the statute establishing administrative authority is challenged on substantive grounds requiring plenary proceedings in which case jurisdiction would be retained in the Law Division of the Superior Court, see In re Application of McCabe, 81N.J.462(1980). Thus it is clear that had the trial court merely sought to review an administrative action and not the constitutionality upon which the authority for the action rested than the Appellate Div. would have jurisdiction to review the matter. Furthermore, the mere fact that appellant brought his action in the trial court as opposed to the Appellate Div. confirms that appellant not only challenged an administrative action but, also,the constitutionality of the

authority upon which the action was based. There can be no question that the State Court considered and upheld the constitutionality of the "Act" since, otherwise, appellant would have either been entitled to a trial de novo, Swayne & Hoyt v. United States, 300 U.S. 297, 57 S.Ct. 478, or the trial court would have lacked jurisdiction to decide the matter. Moreover, appellant's petition for certification would have been granted by the Supreme Court since the departure from the usual course of judicial proceedings by the trial court could not have been justified, otherwise.

In satisfying the jurisdictional requirement of this court on appeal there would appear to be no absolute requirement that there be extensive language in the record challenging the validity of a statute as long as the proceedings of the State Court indicate that such challenge was made and decided upon by the court and that the parties had sufficient reason to believe such questions were properly framed and addressed. In the present matter, the relative lack of language in the record specifically challenging the "Act" could be considered, therefore, not only the result of appellees' inordinate violations of court rules, thus diverting attention from the central focus

of the litigation to procedural matters but that, also, such language would be redundant and unnecessary expressions as it was clear by the trial court's jurisdiction and procedures followed that it was the constitutionality of the "Act" that was to be considered.

THE QUESTIONS ARE SUBSTANSTIAL

This case presents several substanstial constitutional questions concerning the latitude permitted an admission program deemed by legislative enactment to be "public and essential governmental functions necessary for the welfare of the State and the people of New Jersey", and questions concerning the validity of the "Medical and Dental Education Act of 1970", hereafter referred to as the "Act", whose impact and effect is to deprive rejected applicants of a private remedy in matters pertaining to racial discrimination and whether in passage of the "Act" the State legislature has delegated to an administrative body judicial functions which heretofore were within the province of the State courts and whose delegation could not be considered as serving any State compelling interest other than to suspend the applicability of certain federal statutes.

The questions presented are substantial and of public importance as there is an obvious potential for abuse in delegation of judicial authority to administrative bodies when such authority has been clearly vested in the courts by common practice and/or federal statute. Allowing the State court decision to stand could establish a precedent for permitting a State to legislate for itself a degree of immunity from claims based on the 14th Amendment and Federal Statutes by simply converting State affiliated and non-affiliated activities into State administrative functions. Notwithstanding that the actions of State administrative bodies would still be subject to administrative review, there could be a significant harm done to the citizens of the State since the "trier of fact" would now be an admnistrative body under the auspices of the State whose function would be to serve in the dual capacity of prosecutor and judge. Also, there would persist the ever present danger of a State legislating justice in accordance with the popular whims of the times and for a State to treat justice or what it concieved as justice as ever changing or what the local population concieved as fair for any given moment. To say justice is to be transient would be to suspend our federal constitution and individual rights

and civil liberties until the local population submitted their approval. In the present matter, at least, it would appear that individual rights and civil liberties require that discrimination in admissions which the "Act" places within the determinative province of administrative review of the University of Medicine and Dentistry of New Jersey and Rutgers Medical School, a Division of UMDNJ, should be subject to a more exacting judicial scrutiny.

An examination of the legislative history of the "Act" reveals that the greater State autonomy sought by its sponsors was to secure that the requirements of federal financial assistance subject to the provisions of the 1964 Civil Rights Act would be met. Thus, it must have been supposed that the "Act" by its suspension of individual rights and civil liberties would be able to increase minority enrollment in the State's medical and dental schools and qualify the State for federal financial assistance, see N.J. Dept. of Higher Educ., Governer's Conference on Proposed Medical School, held Mar. 1, 1968; N.J. Council on Medical and Dental Educ., Report, 1969; N.J. Dept. of Higher Educ., Public Hearing, 1968; Arguments-regarding N.J. College of Medicine and Dentistry, April 30th, 1968; N.J. College of Medicine and Dentistry, public hearing,

11/14/66. However, not only does it appear that suspension of individual rights and civil liberties in depriving individuals access to the courts was unnecessary in order for the State's medical schools to satisfy the requirements of the Civil Rights Act of 1964 but that, also, the Civil Rights Act, in fact, proscribed such action on the part of the State. As it would appear that the purpose of the "Act" was to satisfy the provisions of 42 U.S.C. 2000(c) et seq. in the State's application to the "Secretary" for federal financial assistance, the "Act"'s linking the divestiture of a citizen's right to judicial process with providing greater opportunities for minorities was in direct violation of 42 U.S.C. 2000c-8 which provides:

> "Nothing in this subchapter shall affect adversely the right of any person to sue for or obtain relief in any court against discrimination in public education".

Moreover, Congress made it clear by 42 U.S.C. 2000(d) and 20 U.S.C. 1681 which vested in the claimant a right to private remedy that federally funded institutions*

* Although appellees' answers to interrogatories were incomplete and evasive, nevertheless, contained therein, in answer to interrogatory #51, was confirmation that the University of Medicine and Dentistry of New Jersey was federally funded in that its policies were subject to the provisions of Executive Orders which established guidelines for federal contractors.

which are alleged to have violated the Equal Protection Clause of the 14th Amendment or to have discriminated on the basis of sex would not be designated the sole "trier of facts" of claims brought against it.

Therefore, from the perspective of what was constitutionally permissable in the consideration of racial factors, the "Act" was not only repugnant to the Federal Constitution and violative of the Statutes, but, moreover, could not be considered as serving any compelling State interest or be reasonably related to some object as the suspension of individual rights and civil liberties disfavored Blacks as well as Whites. A qualified Black student, for instance, who may have been subjected to discrimination because his qualifications surpassed those of Whites would have no cause of action under the "Act". But even if the extent racial factors could be relied upon in admissions was not clear at the time of the "Act"'s passage, this court's determination in Regents of the University of California v. Bakke, 438 U.S. 265, clearly established that racial factors could not be relied upon in a manner exceeding those rights of individuals considered to be personal and civil liberty rights. Thus, the "Act"

would seem to have outgrown its original purpose but, more importantly, was clearly violative of the Constitution and in direct controversion with previous decisions of this court, Univ. of Calif. v. Bakke, 438 U.S. 265; Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 653 (1952).

Thus, given the fact that the State wished to increase minority enrollment in its medical and dental schools but does not have the legal authority to make arbitrary, capricious, or invidious admissions decisions based on race which would be violative of personal and civil liberty rights and as there appears no reason for citizens to relinquish their rights under the law and to assume that the State would act in their best interests given its request for the opportunity not to do so, it would appear that the only purpose that could be attributed for passage of the "Act" would be to conceal racial discrimination by the State exceeding that permitted by federal law. In any perspective, therefore, the "Act" is clearly repugnant to the federal constitution in its intent and violative of the federal statutes in its implementation as their can be no justifiable cause, or compelling State interest, or reasonably related object justifying the "Act"'s suspension of the federal statutes which vest in the citizenry their access to the courts.

Certainly, it could not have been reasonably argued that the shortage of medical graduates in the State would or should immunize the State against judicial process of claims of racial discrimination in medical school admissions or that,as a result, the circumstances of a medical school applicant in the State is transposed into something of an entirely different nature not requiring equal treatment under the law with that of non-medical applicants. In fact, in so far as the State legislature has deemed medical and dental education as"necessary to the welfare of the State and people of N.J." and of such critical importance as requiring passage of the"Act", it would appear more reasonable for medical school applicants to be given,rather , than, deprived the minimal protections given applicants to non-professional State affiliated schools. Needless to say, being that non-medical applicants would have access to judicial process based on claims of racial discrimination, than equal protection of the laws mandates that medical applicants have access as well. The divestiture of medical applicants' access to the courts by the "Act", being based upon no objective other than to deprive applicants of their constitutional rights, clearly renders the "Act" unconstitutional.

However, even assuming that the "Act" were constitutional and that, therefore, appellant did not have a right to a trial de novo, the record below nevertheless indicates that the administrative action rejecting appellant's application was in error as clearly suggested during appellant's meeting with Dr. Taft, (App.,4a), where it was determined appellant was deprived equal treatment on the basis of race. As the trial court failed to even consider the appellant's meeting with Dr. Taft which if considered as part of the administrative record would have presented a genuine issue of material facts, clearly, the summary judgement in favor of the appellees would have to be considered erroneous.

Moreover, closer examination of the administrative record reveals that the Admissions Committee determined that minority students who had low MCAT scores were disadvantaged and therefore subject to higher admission rankings than they would be, otherwise. In other words, for the Admissions Committee to consider appellant's application subject to higher ranking for having overcome adversity as a disadvantaged student it would appear that appellant would have had to score low on his MCAT as the Committee had apparently concluded that low

MCAT scores measured past cultural and/or economic deprivation. However, as among those minority students the Committee considered as disadvantaged there is little doubt that students with higher MCAT scores were given preference, the Committee's own criteria would appear as internally inconsistent since as applied to appellant one would reason that among the disadvantaged minority students lower MCAT scores should have been favored. In other words, the manner in which the Admissions Committee determined student disadvantage was in conflict with the Committee's own criteria for determining excellence and would appear to be a basis for the appellant's claim of arbitrary and discriminatory academic decision making.

Therefore, even assuming that the trial court was correct in ruling that the "Act" was constitutionally valid, the judgement below would still be erroneous since the agency action could not be reasonably based upon the evidence that was presented. If, on the other hand, if one were to consider that the constitutionality of the "Act" and the "agency status" of Rutgers Medical School had no significant bearing on the ruling below then, clearly, appellant would have had a right to trial

de novo and the summary judgement below would be erroneous in so far as it deprived him of that right as the trial court in its summary judgement ruling completely disregarded the genuine issues of material facts between litigants such as whether appellant's ranking below the minimal prerequisite for admission was the result of racial factors and his application being foreclosed from consideration on the basis of race and whether appellant's being denied equal treatment exceeded that permitted by law, all of which would have to be decided by a "trier of fact". Moreover, the summary judgement motion of the appellees' was solely based on the affidavit of Ms. Mary Green, a medical school official who played no direct role in the admission ranking process and whose applicable testimony was not that of personal knowledge. As the granting of summary judgement would have to be considered coming at a time prior to much of the evidentiary material, which could have been reasonably anticipated at trial, having been disclosed which was solely for reason of the appellees' failure to respond to discovery or reinstate their pleadings within a reasonable period of time or within the extended discovery period, the

trial court could not possibly penalize the appellant for failing to controvert appellees' summary judgement motion. Furthermore, after having determined that appellees had met their burden in support of their motion, the trial court failed to provide the appellant ample opportunity for amending his complaint or for providing additional evidence in opposition. Thus, the summary judgement below would not be sustainable on due process grounds, Boulware v. Battaglia, 344 F.Supp. 889, affirmed 478 F. 2d 1398; Machesky v. Bizzell, 288 F. Supp 295, reversed on other grounds 414 F. 2d 283; Caldwell v. Texas, 11 S.Ct. 224, 137 U.S. 697, 34 L.Ed 816.

Therefore, even assuming the "Act" is constitutionally valid or that the constitutional validity of the "Act" had no bearing on the decision below, the ruling of the trial court would still be erroneous on federal grounds since:

1. Even if Rutgers Medical School is to be considered as an "public agency" acting in the best interests of the State and the people of New Jersey and, thus, required to implement administrative choices and actions based only upon substanstial evidence which deprives aggrieved applicants of a trial de novo in a court of law,

clearly the decision rejecting appellant's application was not based on substantial evidence as is evident from appellant's meeting with Dr. Taft, (App.,4a), where it was determined appellant was denied equal treatment.

2. Assuming that the constitutionality of the "Act" had no bearing on the decision below than,clearly, the summary judgement ruling is erroneous since,

(a) There exists a genuine issue of material fact as to whether appellant's ranking below the minimal prerequisite for admission was the result of racial factors relied upon by the rankers and/or foreclosure of appellant's application on the basis of race.

(b) The summary judgement ruling came at a time prior to the disclosure of all relevant evidentiary material in the matter. Thus, the summary judgement was premature as the Judge could not definitely conclude that a trier of fact would not be able to reach a different decision based upon all

the evidentiary material that could be anticipated at trial.

(c) Failure to disclose all relevant information was largely the result of appellees' violations of the discovery rules and having failed to reinstate their pleadings within a reasonable time after having defaulted in their answers to interrogatories for which appellant could not have been reasonably penalized.

Thus, even considering the alternative rationale for the trial court's decision, the Federal Constitution and Statutes mandate that the summary judgement below should be reversed.

Of the two alternative interpretations of the trial court's ruling of,(1) upholding the constitutionality of the "Act" depriving appellant of a trial de novo or (2) condoning blatant procedural inequities atypical of modern day jurisprudence, one would have to suppose the trial court's decision was premised on the former. It would be equally accurate to say that a denial of access to the courts is "Due Process" if "Due Process" is to be found in the trial court's reinstatement of Appellees' pleadings to be followed

by the grant of summary judgement in favor of appellees after the court failed to provide ample opportunity to appellant to controvert appellees' summary judgement motion once it believed appellees to have sustained their burden of proof and while much of the evidentiary material was still being witheld by the appellees by virtue of their having failed to reinstate their pleadings within the extended discovery period and having failed to respond to discovery. Clearly, if the judgement of the trial court were not based on the premise that it was the "Act" that constitutionally divested appellant of a trial de novo in a court of law, then the procedural abnormalities the appellant was subjected to, which one would have thought as becoming abhorrent during the "Age of Renaissance", seemingly would have the sanction of our modern day New Jersey State Court. Accordingly, pursuant to 28 U.S.C. 1257 (2), jurisdiction on appeal to this court from a State court decision sustaining the validity of a State statute has been invoked.

A third rationale for the determination below, which deserves brief mention, might be that the divestiture of appellant's access

to a trial de novo was justified on the basis that appellant lacked standing. But, even so, there would still be substantial constitutional questions as to whether in professional school admissions injury as is palpably alleged to by the appellant can validly be considered as depriving appellant of standing. In other words, did the appellant have the burden of proving the merits of his cause of action in support of his standing and, thereby, have a right to discovery prior to it being determined that his claims were justiciable or would it be sufficient that appellant present allegations of palpable injury to himself and not the merits of the question of whether the palpable injury actually occurred in accordance with the standards set forth in Jenkins v. McKeithen, 395 U.S. 411. However, if it were to be determined that rejected applicants lacked standing to challenge alleged racial discriminatory practices of an admissions committee that ranked their applications below an arbitrarily designated numerical value prerequisite for admission regardless of the extent racial factors may have been palpably alleged as having been relied upon by the admissions committee in the ranking of their applications, then there

would never be cause for judicial determination of claims of academic discrimination in professional school admissions as apparently justiciability would depend on the defendant conceding liability to the claim. Thus, if claims of academic discrimination in professional school admissions are to be considered as being judicially cognizable, the trial court's determination could not be reasonably based upon an assertion that appellant lacked standing as it would appear that the Jenkins v. McKeithen standard for determining standing would have to be applied to professional school admissions as well.

Other questions for consideration by this court concern whether academic decision making can be duly relegated to a public agency and whether the relegation of academic decision making to a federally funded public agency diminishes a rejected applicant's right to judicial process under 42 U.S.C. 2000(d), and 20 U.S.C. 1681. The relative importance of these questions stem from whether the "Act" as contrued by the trial court goes counter to the traditional role of academia in society and, if so, what the legal impact is on individual rights and academic freedoms. These are obviously novel issues which require further comment if the interplay between academic and judicial process is to be fully understood.

It would appear that much of the confusion in the lower courts stems from a misperception as to the extent race may be relied upon in medical school admissions and whether a professed permissable use of race by a professional school can preclude the presentation of a genuine issue of material facts based on racial discrimination alleged to by an aggrieved applicant. Thus, where in Univ. of Calif. v. Bakke, 438 U.S. 265 it was settled that academic decisions based on race may not exclude on the basis of race and that the use of race as a factor when all other factors appear equal would be permissable in a limited sense, the questions that still appear unsettled in the courts below are precisely what extent race may be relied upon and whether a professed permissable use of race by an educational institution can sustain a summary judgement motion against a claim of racial discrimination made against it. The dilemna is one of determining the exact interplay of academic process with that of judicial process and where the court has given its sanction to academic decision making based on racial factors the question yet to be settled is whether academic judgement which is normally not

subject to judicial oversight applies to academic racial consideration as well. Further commentary by this court would appear necessary to the extent that the lower courts have placed academic racial consideration largely within the sphere of academic judgement, immune from judicial scrutiny.

To sum up, jurisdiction on appeal should be noted since the questions presented on appeal are substantial, appealable as of right, and would appear as requiring further commentary by this court if their resolution is to eliminate the misdirection of the courts below. Moreover, the questions that have been presented on appeal are of a racially sensitive concern which, for the sake of those who may be affected thereby, should not be left for speculative afterthought.

We must understand the racial challenge confronting us as a society and our development as a people if we are to properly apply judicial process to the racial choices that have to be made. It is precisely the racial issues presented here, that touches upon the very core of human existence as it reflects man's past and his present, that the manner man and his law will decide will determine his future.

The racial choices are instinctually real, as real,perhaps,as the choices confronting the Darwinian Finches on the Galapagos archipelago, impacting upon students, faculty members, and administrators alike, from which this case, presently before the court, has arisen. In so much as there does not appear to be a religious or evolutionary explanation to everyone's satisfaction, the choice that will have to be made as to man's future course will have to be made by man. It is here where perhaps some further perspective is required.

If we are a continual evolving entity, not simply in the Darwinian sense, but in a spiritual and religious sense, where does that progression lead us? Does it mean that we, as the Darwinian Finches, are to engage, henceforth, in competitive pursuits such as between the races, subjecting ourselves to analogous processes with all its implications for lack of compassion and fellowship among men. Or is there some point in the evolutionary progression where speciation stops, where evolution means something else, a coming to terms with oneself, as it were, a total consolidation of the variegated and gifted talents to be found in the community of men so that the final and ultimate product of the

evolutionary scheme is "man", and the enrichment of his faculties.

In making our conscience choice it would appear that we should choose the latter, an end of our instinctual tendencies giving liscence to racism among ourselves. But could it be said that the Darwinian Finches had the choice not to establish instinctual niches and similiarly do we have the choice? Notwithstanding our primordial instincts of not having a choice, it would appear beneficial to choose not to speciate any longer, to overcome our racial primordial instincts, and for our system of laws and the means by which we judge ourselves to do away with racial distinctions which cripple and separate us. To the extent that the lower courts have not done so much places the onus on this court to do so. Of course, this court's failure to comply could be understood in terms of man's not yet having the choice or man's being subject to his primordial whims which influence his destiny.

However, one might suggest that in our technological age where,in fact, detonation of the nuclear device no longer measures anything in man except perhaps tactile dexterity, and a desire for self-destruction, it would appear, therefore, that modern man is, in fact,

the final product and that evolution today means something else to man than it did in his past and does to his future. With man having the capacity to annihilate himself and the world about him man must be more than an evolutionary creature and the choice to suppress his instincts must be his if he is to survive. The role of man can no longer be said to be that of interacial combatant or competitor but it is to be custodian of the planet and quadrant of the galaxy, that which because of his capacity to destroy, he must learn to serve. Also, as man's capacity may include cloning in the horizon places man as the evolutionary final product who will be able to make the evolutionary choices that, heretofore, were made for him, whatever the choices that can be made, clearly, it is man's ethical and legal sense as manifest by his judicial process that any choice would depend. However, for us to say that racial factors are acceptable criteria for judging ourselves is, in fact, to say that we are still creatures of evolution as much as we are innovators. Notwithstanding the former, as innovators, at least, we must remain cognizant of those values by which we prevail over our primeval past.

It is here, in the 20th Century, where our American civilization as it were intended to be will be fully tested, where man's need for self-understanding will increase and toleration for human differences without the sacrifice of individual justice set in motion. In this light, it might be said that man's transverse to this continent from all walks of life, racial histories, and corners of the globe was not merely a coincidental event without purpose, but that, rather, men having no knowledge of each other and nothing in common but that they were oppressed seeking a new and better way of life was the last variable of man's evolutionary progression made possible by his inevitable mastery of navigational technology, the same technology which would inevitably become more advanced, encompassing other fields of endeavor and which would make plain man's purpose. The common bond among the Founding Fathers by which our Constitution came to being was to seek an end to human oppression, a better way of life, an overcoming of man's instinctual racial and oppressive tendencies that so often plagued human history and resulted in tragic loss of life. It is here, under our Constitution, which prescribes for an evolutionary improvement in compassion and fellowship, where man prepares for the future. Particularly,

in our American society, so diverse and grandiose as it is, there must be ideals which we must bear of a higher order, a statement of mankind to mankind, if we are to maintain our purpose as a united people. There are few among us who would not be willing to commit their life to the "American Dream" and it is characteristically and majestically an "American Dream", non-identifiable in any other people or nation. Being diverse as we are and repelling against oppression not because we were weak but because we were strong, we came to these shores in common bond to create a new way of life, a higher order of existence, a product of man's most recent evolution. Our ideals are that of being fair, of doing what is right, of uplifting the human condition. It is our ideals that bind us as a nation and once our ideals begin to fracture so too does our strength. It is here where the test of valour is to be made, in the arena of our courts which expresses to the world and for the historians who will judge us how we judged ourselves.

No one will deny the remnants of our primordial past and the lingering racial tensions prevalent in our society, even today, nor is it supposed that this court will or can put an end to racial injustice. However,

it would appear that the role of the court is to establish the ideal, to make clear the law, to resolve any lingering questions or ambiguities that have arisen from previous determinations so to proffer guidance to our journey through the storm of half-truths and instinctual misperceptions that has divided us in the past. Thus, it is contended that race being an issue at the very core of our human existence and adversion to oppression the cause of our becoming a nation that racially sensitive matters such as presented here should not be shunned by our courts if the "American Dream", our destiny and purpose as a people and message to the world is not to be diverted in the least.

There can be no doubt that racial distinctions are abhorrent to our judicial values and American aspirations. It is the apparent acquiescence to racial distinctions by the lower courts that appears to require redirection. It is respectfully requested, therefore, that probable jurisdiction on appeal be noted.

Dated: June 20th, 1982

Respectfully submitted,

Asar M. Stepak

Asar M. Stepak,
Appellant, Pro Se

Filing date: 10/22/80

Asar M. Stepak, Plaintiff, Pro Se v. Rutgers Medical School and the State of New Jersey, etc. Defendants	Superior Court of New Jersey Law Division Middlesex County Docket No. L-41916-76 Civil Action Affidavit

I, Asar M. Stepak, state the following:

1. I, Asar M. Stepak, am the son of Polish immigrants who immigrated to the United States in 1948. Neither of my parents obtained formal education nor could speak, write, or understand the English language. I was born on Nov. 1950 and raised in a household in which the Yiddish language was spoken exclusively. I did not begin any instruction in the English language until I entered school. Up until the age of 17 years, I lived with my family on a small farm in a poverty stricken area on Grubb Rd., Newfield, N.J., where the majority of residents were Black and of minority origin. In addition to having to devote much of my time to chores such as tending chickens and livestock, the cultural deprivation of my youth was furthered

by economic hardship and in that the majority of neighboring residents, like myself, were either functionally illiterate and/or culturally and educationally deprived.

Having grown up in an area of impoverished minorities, I developed a special sensitivity to the cultural and economic obstacles confronting minorities which has enabled me throughout the years to establish close and rewarding relationships with members of the minority community. Thus, cognizant of the need for doctors in impoverished areas, as I had explained to the medical school interviewer, my first preference was to practice medicine in an area such as the one I grew up in where the need for my skills would be greatest.

2. In June 1973, I graduated Cum Laude from New York University with a Bachelor of Arts degree in Chemistry. As part of my undergraduate curriculum, I completed all courses required for admission to Rutgers Medical School. On or about September 30th, 1974, I properly applied to Rutgers Medical School, a Division of the College of Medicine and Dentistry of New Jersey, for admission as a member of the 1975-1976 first year class. At the time of my application I was a resident of the State of New Jersey and resided at

1792 E. Walnut Rd., Vineland, N.J. In my application for admission I disclosed the facts of my cultural deprivation and national origin. Prior to my application I completed the Medical College Admissions Test and scored a 715 on the science section, which ranked higher than 98% of all other students taking the exam nationwide, and was more than 70 points higher than the mean science MCAT score achieved by the 1975 entering class at Rutgers Medical School. My score on the Math and Verbal sections of the exam were higher than 95% and 83% respectively of the scores achieved by all other students taking the exam nationwide. Further, my grade point average compiled at New York University where I had enrolled in some of the school's most rigorous laboratory and advance courses, was equal to the mean grade point average achieved by members of the '75-'76 first year class at Rutgers. In addition to excelling academically, I was an active participant in many of the extracurricular and medicine oriented activities including the Bristol Pre-med Society where I expressed my desire for helping the chronically ill and disabled.

To sum up, even though I had encountered substantial cultural, developmental, and educational barriers as a child and in later

years, the credentials I presented for admission to Rutgers Medical School were, nevertheless, equal to or above that achieved by the '75-'76 first year class.

3. At the time I received notice of rejection for admission to the Medical Program,I was unaware of any specific grounds for rejection nor of the existence of the special remedial program for minority students. I did not become aware of the special minority remedial program nor of the grade point averages and MCAT scores of the '75-'76 first year class until the Summer of '76 as revealed in that year's AAMC publication, Exhibit "D". Further, I did not become aware of the granting of special consideration in the admission rating process on the basis of race until April 14th, 1977, when I had met with Dr. Taft, chairman of the admissions committee. During that meeting, Dr. Taft informed me that I was denied special consideration in the admission rating process whereas others were not, solely on the basis of race. As a result, excluding the racial consideration given students, applicants presenting substantially lesser credentials than myself were admitted. Furthermore, Dr. Taft conceded that granting my application minority status would have been justified but because of my race I was automatically precluded

from special consideration in the admission rating process. Thus, it became clear to me that my application for admission was not considered on an individual or equal basis with all other applicants and that I had been foreclosed from competing for all available seats on the basis of race.

4. I make this affidavit in support of my Motion for Summary Judgement scheduled to be heard on Fri. Oct. 24th, 9:A.M. or as soon as counsel may be heard.

Dated:
Oct. 17th, 1980

s/ Asar M. Stepak
Plaintiff, Pro Se

Filing date: 4/26/78

Asar M. Stepak, Plaintiff v. Rutgers Medical School, A Division of the College of Medicine and Dentistry of New Jersey, et al., Defendants	Superior Court of N.J. Law Division Middlesex County Docket No. L-41916-76 Civil Action Order Dismissing Answer of Defendants Rutgers Medical School and the State of New Jersey

This matter having come before the Court on the application of Jeffrey I. Baron, Esquire, of Arthur Batoff, A Professional Corporation, attorneys for Plaintiff, Asar M. Stepak, for an Order dismissing the Answer of Defendants, Rutgers Medical School and the State of New Jersey based upon R 4:23-5(a) and upon the Affidavit annexed hereto;

It is on this 24th day of April, 1978, Ordered that Defendants' Rutgers Medical School and the State of New Jersey Answer filed in this matter be and is hereby dismissed pursuant to the terms and provisions of R. 4:23-5(a);

It is further Ordered that the Attorneys for Plaintiff mail a copy of this Order and Affidavit to Stephen P. Deitsch, Esquire,

Deputy Attorney General, Attorney for the aforesaid Defendants, within seven (7) days of the date hereof.

s/ John C. Demos
A.J.S.C.

Filing date: 10/31/80

Asar M. Stepak,
Plaintiff

v.

College of Medicine and Dentistry of New Jersey-Rutgers Medical School and State of New Jersey,
Defendants

Superior Court of N.J.
Law Division-Middlesex County
Docket No. L-41916-76
Civil Action

Order

This matter having been opened to the court on October 10th, 1980, John J. Degnan, Attorney General of New Jersey, appearing by Douglass L. Derry, Deputy Attorney General, for defendants College of Medicine and Dentistry of New Jersey, and Asar M. Stepak, appearing pro se, and the court having before it the defendant's motion to reinstate their answer and the plaintiff's motion for summary judgement, and the court finding that the defendants provided answers to interrogatories to the plaintiff and paid costs of $50 to the Clerk pursuant to R. 4:23-5 and that this matter involves issues of public importance as to the admissions policies of a public agency which should be resolved after full and fair opportunity for explication of the facts, and the court having considered the briefs and affidavits on file and the argument of

the parties and for good cause shown,

It is thereupon this 27th day of October, 1980 Ordered that the oral decision of this court granting summary judgement in favor of the defendant is vacated;

It is further Ordered that the answer of the defendant College of Medicine and Dentistry of New Jersey-Rutgers Medical School and State of New Jersey shall be and hereby is reinstated, and

It is further Ordered that the plaintiff shall be and hereby is provided an additional two weeks to submit to the court any supplementary affidavits in support of his motion for summary judgement, and the motions of the plaintiff and defendant for summary judgement shall be argued on October 24th, 1980.

s/ C. John Stroumtsos
J.S.C.

Filing date: 12/5/80

Asar M. Stepak,
Plaintiff

v.

College of Medicine and Dentistry of New Jersey-Rutgers Medical School and State of New Jersey,
Defendants

Superior Court of N.J.
Law Division-Middlesex County
Docket No. L-41916-76
Civil Action
Order

This matter having been opened to the court on the adjourned return date of motions for summary judgement, John J. Degnan, Attorney General of New Jersey, attorney for the defendants appearing by Douglass L. Derry, Deputy Attorney General, and Asar M. Stepak appearing pro se and it appearing to the court that the plaintiff applied for admission to the College of Medicine and Dentistry of New Jersey-Rutgers Medical School entering class of 1975 and received two interviews, and it further appearing that the Admissions Committee of the Rutgers Medical School in its review of the plaintiff's application assigned him a benchmark score of 6.0 out of a possible 10.0 and that Rutgers Medical School accepted no applicant with a benchmark score of less than 8.0 and it further appearing that 715 applicants to the Rutgers Medical School had benchmark scores higher than the plaintiff, including only 64 minority applicants and that in May 1975 the Rutgers Medical School notified the plaintiff that it

had rejected his application for admission, and it further appearing that the Rutgers Medical School evaluated each application, including the application of the plaintiff, on a case-by-case basis and considered all relevant factors relating to an applicant's qualifications for admission before assigning a benchmark score and accepting or rejecting an application, and that minority and non-minority applications competed against each other for the same number of seats and that the Rutgers Medical School did not maintain a quota or otherwise reserve a specific number of seats for minority application, and it appear- to the court that there is no genuine issue as to any material fact and that the defendant is entitled to judgement as a matter of law, and the court having considered the briefs and affidavits on file, and for good cause shown,

It Is Thereupon this 18th day of November, 1980, Ordered that summary judgement is granted in favor of the defendants and against the plaintiff and the complaint in this matter shall

be and hereby is dismissed with prejudice.

s/ C. John Stroumtsos
J.S.C.

Filing date: Jan. 8th, 1982

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
Docket # A-3172-80T1

Asar M. Stepak,
Plaintiff-Appellant

v.

Rutgers Medical School
and the State of New
Jersey,
Defendants-Respondents

Submitted December 23, 1981. Decided Jan. 8th, 1982.

Before Judges Michels, McElroy and J.H. Coleman.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County.

Asar M. Stepak, appellant, filed briefs, pro se.

James R. Zazzali, Attorney General of New Jersey, attorney for respondents(Andrea Silkowitz, Deputy Attorney General, of counsel; Douglass L. Derry, Deputy Attorney General, on the brief).

PER CURIAM

Plaintiff filed a complaint challenging Rutgers Medical School's failure to admit him as a full time student. He also sought compensatory

and punitive damages. The Law Division granted summary judgement to the defendant.

On appeal, plaintiff has raised the following contentions:

1. Defendants have failed to show just cause as to why relief from the April 24th, 1978 Order to suppress defendants' answer should be granted.
2. Defendants have failed to provide fully responsive answers to interrogatories.
3. That this case concerns questions of public importance is not sufficient cause for relief from the suppression order.
4. Defendants' failure to answer interrogatories is a concession of liability and/or an act of contumacy.
5. Rutgers Medical School maintains a minority quota.
6. Plaintiff has legal right to the relief requested in his complaint.

We have considered the contentions and all of the arguments advanced by plaintiff in support of them. We are satisfied that all issues of fact and law raised are clearly without merit. R.2:11-3(e)(1)(A) and (E).

Affirmed.

Filing date: Mar. 24th, 1982

SUPREME COURT OF NEW JERSEY
C-444 September Term 1981
Docket # 19,492

Asar M. Stepak,
Plaintiff-Petitioner

v.

Rutgers Medical School
and the State of New
Jersey, etc.
Defendants-Respondents

ON PETITION FOR CERTIFICATION

To the Appellate Division, Superior Court:

A petition for certification of the judgement in A-3172-80T4 having been submitted to this Court, and the Court having considered the same;

It is Ordered that the petition for certification is denied with costs.

Witness, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 22nd day of March, 1982.

s/ Stephen Townsend
Clerk

(Notice of Appeal was submitted for filing in the Appellate Div. on May 11th, 1982. The Notice was not filed since the App. Div. determined that its Jan. 8th, 1982 decision was not the final judgement of the State court appealable in this matter.)

IN THE APPELLATE DIVISION OF THE
SUPERIOR COURT OF NEW JERSEY

Asar M. Stepak, Appellant

v.

Rutgers Medical School-a Division of the University of Medicine and Dentistry of New Jersey; the Board of Trustees of the University of Medicine and Dentistry of New Jersey; the Department of Higher Education of the State of New Jersey and the State of New Jersey; jointly, severally, and/or in the alternative,

Appellees

Docket No. A-3172-80T4, Civil Action,

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Asar M. Stepak, the appellant above-named, hereby appeals to the Supreme Court of the United States from the judgement of the Appellate Division of the Superior Court of New Jersey, affirming Summary Judgement in favor of the appellees, entered in this action on Jan. 8th, 1982.

This appeal is taken pursuant to 28 U.S.C., section 1257 (2) .

Dated: May 11, 1982

s/ Asar M. Stepak
Appellant-Pro Se

Filing date: 5/12/82

IN THE SUPREME COURT OF THE
STATE OF NEW JERSEY

Asar M. Stepak, Appellant

v.

Rutgers Medical School-a Division of the University of Medicine and Dentistry of New Jersey; the Board of Trustees of the University of Medicine and Dentistry of New Jersey; the Department of Higher Education of the State of New Jersey and the State of New Jersey; jointly, severally, and/or in the alternative,

Appellees

Docket No. 19,492, Civil Action

NOTICE OF APPEAL TO THE SUPREME
COURT OF THE UNITED STATES

Notice is hereby given that Asar M. Stepak, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgement of the Supreme Court of the State of New Jersey, affirming Summary Judgement in favor of the appellees, entered in this action on March 22nd, 1982.

This appeal is taken pursuant to 28 U.S.C., section 1257 (2).

Dated: May 11, 1982

s/ Asar M. Stepak
Appellant-Pro Se

POINT III

THIS COURT LACKS JURISDICTION TO GRANT THE RELIEF REQUESTED IN THIS CASE BECAUSE THE APPELLATE DIVISION POSSESSES EXCLUSIVE JURISDICTION TO REVIEW THE ACTION OF A STATE ADMINISTRATIVE AGENCY

This court lacks jurisdiction to decide the instant matter because jurisdiction at this point resides exclusively in the Appellate Division. It is inescapably clear that the Chancery Division does not possess the requisite jurisdiction to review and adjudicate the action or nonaction of a State administrative agency.

As noted earlier, the Legislature enacted the Medical and Dental Education Act of 1970, N.J.S.A. 18A:64G-1 et seq."... to provide greater numbers of trained medical personnel to assist in the staffing of the hospitals and public institutions and agencies of the state and to prepare greater numbers of students for the general practice of medicine and dentistry ..." N.J.S.A. 18A:64G-2. Under the Act, the College of Medicine and Dentistry of New Jersey was established in the Department of Higher Education, a principal department in the executive branch of State government. N.J.S.A. 18A:64G-3. The Chancellor of Higher Education with the approval of the State Board of Higher Education is vested with the power to"...promulgate rules

and regulations, establish procedures and take all other necessary steps to include the implementation of the provisions of this Act." N.J.S.A. 18A:64G-34. Moreover, the exercise by the College of the powers conferred upon it under the Act" ...in the presentation and operation of a program of medical and dental education shall be deemed to be public and essential governmental functions necessary for the welfare of the State and the people of New Jersey." N.J.S.A. 18A:64G-3. Plainly, therefore, the College of Medicine and Dentistry of New Jersey is a State administrative agency, and the present plaintiff seeks to review a decision of that agency.

Our Supreme Court pursuant to its constitutional authority over the allocation of business within the State courts has established an"...easy mode of review..." of actions or inactions of State administrative agencies. Johnson v. N.J. State Parole Bd., 131 N.J. Super. 513, 518 (App. Div. 1974). The Rules of Court specifically state in pertinent part as follows:

> "Except as otherwise provided by R. 2:2-1 (a) (3) (final judgments appealable directly to the Supreme Court), appeal may be taken to the Appellate Division as of right... (2) to review final decisions or actions of any state administrative agency or officer..." (emphasis supplied).

Moreover, as to interlocutory decisions of a

State agency, which are not appealable as a matter of right, our Supreme Court has provided that "(t)he Appellate Division, may grant leave to appeal, in the interest of justice..." R. 2:2-4(emphasis supplied). Thus, our Supreme Court specifically"...contemplated that 'every proceeding to review the action or inaction of a state administrative agency would be by appeal to the Appellate Division.'" Pascucci v. Vagott, 71 N.J. 40, 52 (1976)(emphasis supplied).

Only two exceptions to that general rule have been judicially recognized, and they are not applicable to the present case. See Pfleger v. State Highway Dep't., 104 N.J. Super. 289, 291-93 (App. Div. 1968)(action to compel condemnation proceedings by Department of Transportation); Baldwin Constru. Co. v. Essex Cty. Bd. of Tax., 27 N.J. Super. 240, 242 (App. Div. 1953)(proceedings relating to an administrative body with authority confined to a single locality).

Moreover, in the event the Appellate Division concludes that the record before the agency is inadequate for thorough review, the Rules of Court provide a procedure for supplementation of the record. R. 2:5-5. In addition, as to the review of actions otherwise cognizable in a trial division of the Superior Court it is settled that the Appellate Division may also"...exercise such original jurisdiction as is necessary to the complete

determination of any matter on review." Pascucci v. Vagott, supra at 53. In other words, "...the Appellate Division may properly hear the appellant's entire case..." Ibid. (emphasis supplied). See also Bishop v. N.J. Sports and Exposition Authority , 168 N.J. Super. 533, 537 (App. Div. 1979)("...(T)he allocation scheme mandated by the implementing rules of practice adopted by the Supreme Court is the requirement that review of actions by state administrative agencies be sought in the first instance in the Appellate Division....") Plainly, therefore, an appeal to the Appellate Division is "... the exclusive method for review of action or inaction..." of a State administrative agency, and it is indelibly clear that the Chancery Division lacks the jurisdiction to review such action or inaction. Johnson v. N.J. State Parole Bd., supra.

It is apparent, therefore, that the College of Medicine and Dentistry is a State administrative agency, and the complaint in this case seeks the review of a determination of that agency, the rejection of the present plaintiff's rejection from admission to medical school. The Superior Court, Law Division, however, lacks jurisdiction to review such matters, and the present proceedings should be dismissed or in the alternative transferred pursuant to R. 1:13-4 to the Appellate Division.

Title 42 U.S.C. 1985 provides:

Preventing officer from performing duties:

(1) If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impeded him in the discharge of his official duties;

Obstructing justice; intimidating party, witness, or juror:

(2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

Depriving persons of rights and privileges:

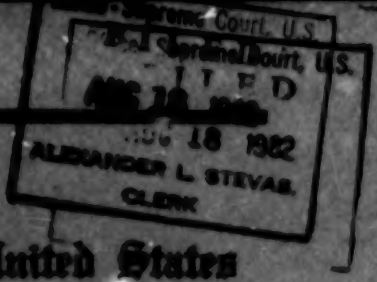
(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privlege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

Title 42 U.S.C. 1986 provides:

Action for neglect to prevent:

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this Title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding $5,000.00 damages theirein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued.

NO. 81-2389



IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ASAR M. STEPAK,

Appellant,

vs.

RUTGERS MEDICAL SCHOOL, A DIVISION OF THE COLLEGE OF MEDICINE AND DENTISTRY OF NEW JERSEY, RUTGERS, THE STATE UNIVERSITY and THE STATE OF NEW JERSEY, jointly, severally and/or in the alternative,

Appellees.

On Appeal from the Supreme Court of New Jersey

MOTION OF APPELLEES TO DISMISS OR AFFIRM

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NO. 81-2389

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ASAR M. STEPAK,

Appellant,

vs.

RUTGERS MEDICAL SCHOOL, A DIVISION OF THE COLLEGE OF MEDICINE AND DENTISTRY OF NEW JERSEY, RUTGERS, THE STATE UNIVERSITY and THE STATE OF NEW JERSEY, jointly, severally and/or in the alternative,

Appellees.

On Appeal from the Supreme Court of New Jersey

MOTION OF APPELLEES RUTGERS MEDICAL SCHOOL OF THE COLLEGE OF MEDICINE AND DENTISTRY OF NEW JERSEY AND THE STATE OF NEW JERSEY TO DISMISS OR AFFIRM

Pursuant to Rule 16.1(b) and (d) of the Court, the Attorney General of New Jersey, on behalf of appellees Rutgers Medical School of the College of Medicine and Dentistry of New Jersey and the State of New Jersey hereby moves to dismiss the appeal or affirm the judgment of the Supreme Court of New Jersey on the ground that the constitutional questions raised by appellant are so insubstantial as to obviate further argument.

Counter-Statement of the Case

In September 1974, Asar M. Stepak (hereafter the appellant) applied for admission to the Rutgers Medical School, a component unit of the College of Medicine and Dentistry of New Jersey (hereafter the "College" or "CMDNJ-RMS"), for admission to its 1975 entering class (Ra*4).

Admission to CMDNJ-RMS involves a review of both an applicant's academic background and a ". . . careful appraisal of personalities of the applicants for qualities which characterize capable practitioners of medicine" (Ra2). In addition, the Admissions Committee is interested in an applicant's patient care experience, leadership qualities, community activities and other subjective measures of a candidate's likelihood of becoming a skillful physician (*Ibid.*). Thus, admission to CMDNJ-RMS involves the review of a variety of objective and subjective factors, and academic performance as measured by undergraduate grades and MCAT scores is only one factor (*Ibid.*).

With regard to minority applications, over the past several years, CMDNJ-RMS has accepted a varying number of minority applicants. The class which entered in 1978 includes 18 blacks and five Hispanics out of 108 seats. The class which entered in 1977 contains 17 blacks and seven Hispanics. The 1976 class has 17 blacks and three Hispanics. The 1975 class, the year for which the plaintiff applied, included 18 blacks and four Hispanics (Ra2 to Ra3). Thus, the trial court concluded that CMDNJ-RMS

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* This designation refers to the appellees' appendix.

did not maintain a quote or otherwise reserve a specific number of seats for minority applicants (Aa*10 to Aa11).

However, in weighing the factors considered during the review process, such as academic performance and leadership potential, the College does take race into consideration. For example, the College recognizes that a minority applicant with a strong record of accomplishment may have demonstrated a level of perseverance and ability not reflected in raw test scores (Ra3). Thus, the Admissions Committee has determined that consideration of race assists it in evaluating the individual attributes of an applicant and selecting a student body with the most promise and diversity (Ra3).

Moreover, the College, which is centered in a community with a large minority population and attempts to serve the needs of that population, has a strong commitment to affirmative action. The Board of Trustees has determined that there should be equal opportunity to admission without regard to, among other things, race or color. In that regard, it is instructive to note that in 1970 a task force of the Association of American Medical Colleges issued a report which noted that blacks constituted 2.2% of the country's doctors and 2.8% of the medical students (Ra3). That report further noted that among the factors causing such a situation were financial and educational obstacles to minorities, including cultural bias in the MCAT. *Ibid.* If academic performance as measured solely by test scores and MCAT scores were the single criterion for acceptance, many minority applicants would be eliminated. Thus, the Admissions Committee determined that consideration of race further assists it in compensating for cultural bias found by the Association of Americal Medical Colleges in MCAT scores (Ra3).

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* This designation refers to the appellant's appendix.

Of further concern to the Admissions Commitee is that with only 108 available seats and over 2400 applicants it is impossible to avoid rejecting qualified applicants. Thus, the goal of the Admissions Committee is to ensure that all factors which relate to an individual candidate's qualifications to practice medicine are considered before a decision is made (Ra4).

For the 1975 academic year, the year for which the appellant applied, the admissions process consisted of a series of steps in which applicants were screened, interviewed and ranked against each other. During the screening stage, the Admissions Officer and Admissions Committee reviewed each of the more than 2000 applications and invited for an interview those applicants who demonstrated achievement in all categories considered by the College (Ra4). Invited applicants were then interviewed by one member of the Admissions Committee. Immediately after an interview, the interviewer was required to prepare a written evaluation which became an additional document relied upon by the Admissions Committee in ranking an applicant (Ra5). If either was dissatisfied, an applicant or an interviewer could request a second interview with a different interviewer (*Ibid.*). After an interview, the Admissions Committee reviewed and ranked all applicants against each other. Such ranking was achieved by scoring an application on a scale of one to ten with ten representing the top score. In 1975, no applicant with a score of less than 8.5 was accepted (Ra5 to Ra6).

The appellant's application was one of those selected by the Admissions Officer for an automatic interview because of his high academic achievement, and it was transmitted to the Admissions Committee for an interview (Ra4). He was interviewed on January 19, 1975 and, on February 13, 1975, requested a second interview so he could ". . . ex-

plain more fully certain aspects of my application." On February 21, 1975, he received a second interview before a different interviewer (Ra5). The Admissions Committee then reviewed his application and interview results, ranked his application in comparison to the other applicants, and assigned him a benchmark score of only 6.0 (Ra6). Thereafter, he was notified that his application was rejected (*Ibid.*).

It is instructive to note that even if every minority applicant were removed from the accepted and alternate lists, the appellant would still not have been accepted. In 1975, there were 153 people placed on the alternate list. Of those people, 135 were non-minority and 18 were minority applicants. In addition to the applicants on the alternate list, there were 562 candidates who scored higher than the plaintiff, including 46 minority applicants, and who were rejected without placement on the alternate list (Ra6). Thus, the trial court found that 715 applicants had benchmark scores higher than the appellant and even if the College accepted no minority applicants, the appelant's application would not have been reached.

On January 8, 1982, the Superior Court of New Jersey, Appellate Division, affirmed the determination of the trial court. It stated in part that it had ". . . considered the contentions and all of the arguments advanced by the plaintiff in support of them. We are satisfied that all issues of fact and law raised are clearly without merit."

On March 27, 1982, the Supreme Court of New Jersey denied the appellant's petition for certification.

On May 14, 1982, the appellant filed a notice of appeal with this Court pursuant to 28 U.S.C. §1257(2). Appellees have filed the within motion to dismiss or, alternatively, to affirm on the grounds that no substantial federal question is raised by the appeal.

ARGUMENT

This case presents no substantial constitutional question not previously decided by this Court.

The appeal should be dismissed or the judgment of the Superior Court of New Jersey, Appellate Division, should be affirmed because the constitutional questions raised by appellant are so insubstantial as to obviate any further argument.*

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* The appellant has improperly brought this matter by appeal pursuant to 28 U.S.C. §1257(2) rather than by petition for certiorari pursuant to 28 U.S.C. §1257(3). Under 28 U.S.C. §1257(2), a final judgment of a state's highest court may be reviewed by appeal ". . . where is drawn in question the validity of a statute of any state on the grounds of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity." This matter began as a 13 count complaint in state court for compensatory and punitive damages for discrimination in the rejection of his application for admission to medical school. Appellant sought relief under 42 U.S.C. §1983, §2000c, the due process and equal protection clauses of the Constitution of the United States, New Jersey common law, and various provisions of the Constitution of New Jersey. The appellant did not challenge any state statute as repugnant to the Constitution of the United States and the state courts did not expressly decide such validity.

28 U.S.C. §1257(3) provides for review of a state court judgment by writ of certiorari ". . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under the United States." As noted above, appellant suggests he was discriminated against in violation of federal statute and the Constitution of the United States. It is plain, therefore, that any right of review he possesses is by writ of certiorari rather than by appeal. See *Garrity* v. *New Jersey*, 385 U.S. 493, 496 (1967).

In *University of California Regents* v. *Bakke*, 438 U.S. 265 (1977), this Court established the standards for review of a university's admissions policies, and determined that the "two track" admissions process under review in that case was unconstitutional. Under that program, minority and non-minority applications were reviewed separately. The admissions committee ". . . did not rate or compare the special candidates against the general candidates . . ." (*Id.* at 275) and non-minority applicants competed for fewer seats in the entering class than the minority candidates (*Id.* at 289). Mr. Justice Powell, announcing the judgment of the Court, stated that

> . . . No matter how strong their qualifications, quantitative and extracurricular, including their own potential for contribution to educational diversity, *they are never afforded the chance to compete with applicants from the preferred groups* for the special admission seats. *At the same time, the preferred applicants have the opportunity to compete for every seat in the class.* [*Id.* at 319; emphasis supplied].

Thus, stated Mr. Justice Powell, the "principal evil" of the University of California program was the ". . . denial to respondent of this individualized consideration without regard to race. . . ." (*Id.* at 318 n. 52).

On the other hand, Mr. Justice Powell further observed ". . . [s]o long as the university proceeds on an individualized, case-by-case basis, there is *no warrant for judicial interference in the academic process. . . .*" (*Id.* at 319 n. 53; emphasis supplied). In a properly administered program, ". . . race or ethnic background may be deemed a 'plus' in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats" (*Id.* at 317).

He described the beneficial features of such an individualized program as follows:

> . . . The file of a particular black applicant may be examined for his potential contribution to diversity without the factor of race being decisive when compared, for example, with that of an applicant identified as an Italian-American if the latter is thought to exhibit qualities more likely to promote beneficial educational pluralism. Such qualities could include exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important. In short, an admissions program operated in this way is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight. . . . [*Id.* at 317; emphasis supplied].

See opinion of Justices Brennan, White, Marshall and Blackmun, concurring in the judgment in part and dissenting ("In our view, Title VI . . . does not bar the preferential treatment of racial minorities as a means of remedying past societal discrimination to the extent that such action is consistent with the Fourteenth Amendment. . . .") (*Id.* at 328). *Cf. United Steelworkers, etc.* v. *Weber,* 443 U.S. 193, 207-208 (1979) ("We therefore hold that Title VII's prohibition in §703(a) and (d) against racial discrimination does not condemn all private, voluntary, race-conscious affirmative action plans.") Thus, a majority of the Court concluded that, especially when a university proceeds on an individualized, case-by-case basis, race can be an appropriate factor in a university's admissions process.

The determination of the state courts in this matter simply represented the application of undisputed facts to those settled standards established by this Court. As noted earlier, the Association of American Medical Colleges issued a report in which it noted that in 1970 blacks constituted only 2.2% of the country's doctors and 2.8% of the medical students and that among the reasons for such a shortage was cultural bias in testing procedures used in the admissions process (Ra3). The Board of Trustees of the College of Medicine and Dentistry of New Jersey has, therefore, committed the College and its component units, such as the Rutgers Medical School, to a policy of affirmative action in admissions. As already stated, CMDNJ-RMS has acknowledged that race is among the factors taken into consideration in the admissions process.

Unlike the admissions procedures at the University of California, however, CMDNJ-RMS gives individualized, case-by-case consideration to an applicant's qualifications and minority and non-minority applicants compete against each other for the same number of seats in an entering class. In other words, a determination is not reached solely on the basis of a candidate's test score or race. Every application is thoroughly reviewed and compared to the entire pool of applicants and all relevant factors in an applicant's background, such as drive and determination or leadership qualities, are considered before a determination is reached. Recognizing that not all qualified applicants can be accepted, the goal of the Admissions Committees at CMDNJ-RMS is to consider all factors relevant to an individual's qualifications to practice medicine before a determination is made (Ra4).

More specifically, as noted earlier, for the 1975 entering class, the admissions process consisted of the follow-

ing: Upon receipt of incoming applications, the Admissions Officer reviewed them and invited for an interview any candidate who demonstrated high achievement in all categories considered by the College. If an applicant was not automatically invited for an interview, the Admissions Officer transmitted his or her application to the Admissions Committee for further screening. It is instructive to note, moreover, that unlike the University of California CMDNJ-RMS did not have a minority screening committee and all further processing of an application was by the Admissions Committee (Ra4 to Ra6). Thus, CMDNJ-RMS did not use a two-track admissions system, such as the one determined illegal by the Court in *Bakke*.

Upon receipt of an application, one member of the Committee would first review it. If that member recommended an interview, then such an interview would be granted. On the other hand, if that member recommended against an interview, the application was presented to the entire committee and, if the committee agreed, the application was rejected (Ra4 to Ra5).

As to applicants who received an interview, such interviews were conducted by a member of the Admissions Committee who attempted to assess both the objective and subjective variables considered by the Admissions Committee. Both an interviewer and an applicant had the option to request a second interview if either was dissatisfied (Ra5).

Upon interviewing all candidates selected for an interview, the Admissions Committee reviewed and ranked all such applicants. In that regard, three members of the Admissions Committee reviewed an application and rated it on a scale of one to ten, with ten representing the top score. Those three scores were then averaged with a

similar ranking assigned by an interviewer and the result was an applicant's benchmark score. Applicants with a benchmark score of 8.5 were recommended for acceptance. Later during the year, however, when it became apparent that the school did not have enough room for all such applicants, those whose names had not been reached were placed on an alternate list. In 1975, every applicant with a benchmark score of 8.5 or less was rejected (Ra5 to Ra6).

In the present case, the appellant was among those applicants who because of his outstanding undergraduate record was automatically invited for an interview by the Admissions Officer. That interview was conducted in January 1975 and, at his request, a second interview was conducted with a different interviewer in February 1975. Thereafter, his application was ranked by three members of the Admissions Committee together with similar rankings by his interviewers and he received a benchmark score of 6.0. As noted earlier, every applicant with a benchmark score of 8.5 or less was rejected by the College. Accordingly, the appellant's application was rejected, and the state court properly determined that appellant competed with all other minority and non-minority applicants for all available seats in the entering class.

Clearly, therefore, this case merely involves the application of undisputed facts to the principles set forth by the Court in *Bakke* and presents for review no substantial constitutional question not previously decided by the Court.

The appellant suggests this case involves the constitutionality of the Medical and Dental Education Act of 1970, N.J.S.A. 18A:64G-1 *et seq.*, which established the College

of Medicine and Dentistry of New Jersey* (Abi** to Abiv). It is well settled, however, that for this Court to have jurisdiction to deal with a particular issue it must have first been presented to the state courts deciding the matter. *Street* v. *New York*, 394 U.S. 576, 581-582 (1969). An issue ". . . must have been definitely brought to the court's attention. . . ." *Live Oak Water Users' Ass'n* v. *Railroad Commission*, 269 U.S. 354, 357 (1926). The Court ". . . will not pass upon the constitutionality of a state statute before the state courts have had an opportunity to do so. . . ." *Adler* v. *Board of Education of City of New York*, 342 U.S. 485, 496 (1952). See also *Tacon* v. *Arizona*, 410 U.S. 351, 352 (1973).

In the present case, as noted earlier, the complaint does not challenge the constitutionality of the statute establishing the College. Rather, the appellant suggested that appellees engaged in discriminatory acts in violation of federal statutes, the Constitution of the United States, New Jersey common law and the New Jersey Constitution. In *Phillips* v. *United States*, 312 U.S. 246, 252 (1941), the Court observed that ". . . an attack on lawless exercise of authority in a particular case is not an attack upon the constitutionality of a statute conferring the authority even though a misreading of the statute is invoked as justification. . . ." See *Beck* v. *Washington*, 369 U.S. 541, 549-550 (1962) (". . . Although both opinions of the Washington Supreme Court discuss the *interpretation* of §10.28.030, neither considered that question in light of the equal protection argument for that argument was

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*Under P.L. 1981, c. 325, §2, among other things, the College was redesignated as the University of Medicine and Dentistry of New Jersey.

**This designation refers to the appellant's jurisdictional statement.

never properly presented to the court in relation to the statute . . .") (emphasis in original); *Lynch* v. *New York*, 293 U.S. 52, 54 (1934) (". . . Nor can claim of jurisdiction be sustained by reference to briefs and statements which are not part of the record"). Thus, the appellant did not present the issue of the constitutionality of the statute to the state court, and it is plain that this Court lacks jurisdiction to review that issue.

The appellant seems to further suggest that the state court denied him a right to a "trial de novo" when it granted the College's motion for summary judgment (Abii). In *Boddie* v. *Connecticut*, 401 U.S. 371, 378 (1971), the Court outlined the requirements of due process as follows:

> *Due process does not, of course, require that the defendant in every civil case actually have a hearing on the merits.* A state can, for example, enter a default judgment against a defendant who, after adequate notice; fails to make a timely appearance [citation omitted] or who, without justifiable excuse, violates a procedural rule requiring the production of evidence necessary for orderly adjudication [citation omitted]. What the Constitution does require is 'an *opportunity* . . . granted as a meaningful time and in a meaningful manner' [citation omitted] 'for [a] hearing appropriate to the nature of the case [citation omitted]. The formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings.' . . . In short, 'within the limits of practicability' [citation omitted], a state must afford to all individuals a meaningful opportunity to be heard if it is to fulfill the promise of the due process clause . . . [first emphasis supplied].

See, *e.g.*, *Minneapolis & St. L.R. Co.* v. *Bombolis*, 241 U.S. 211, 217 (1916). (". . . The 7th Amendment applies only to proceedings in courts of the United States, and does not in any manner whatever govern or regulate trials in state courts, or the standards which must be applied concerning the same. . . ."). In the present case, the appellant failed to present for review any material issue of fact. In support of its motion for summary judgment, the College filed an affidavit of its admissions officer setting forth the admissions process and the reasons for the appellant's rejection. On August 8, 1980 rather than decide the motion immediately, the trial court reserved decision and provided the appellant an additional opportunity by affidavit or otherwise to demonstrate the existence of a material fact. On a second occasion, after the court had actually rendered an oral opinion granting summary judgment, the court vacated that oral determination and provided the plaintiff an additional two weeks to submit affidavits or documentation in opposition to the College's motion. Indeed, it should be noted that on July 16, 1980, the trial court had reinstated the appellant's complaint which had been dismissed for his failure to appear at trial (Ra8). Thus, after reinstating his complaint, the trial court provided the appellant two separate opportunities to submit facts in opposition to the College's motion. Plainly, the court provided appellant a meaningful opportunity to be heard at a meaningful time and did not deny him any right to any "trial de novo".

Therefore, it is clear that the present appeal presents for review no substantial constitutional question not previously decided by this Court, and the appeal should be dismissed or, in the alternative, the judgment affirmed.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the within appeal should be dismissed for want of a substantial federal question which would require plenary consideration by this Court or alternatively the final judgment of the Superior Court of New Jersey, Appellate Division, should be affirmed.

Respectfully submitted,

IRWIN I. KIMMELMAN,
Attorney General of New Jersey,
Attorney for Appellees, Rutgers Medical School, etc., et al.,
By: DOUGLASS L. DERRY,
Deputy Attorney General.

JAMES J. CIANCIA,
Assistant Attorney General,
Of Counsel.

DOUGLASS L. DERRY,
Deputy Attorney General,
On the Brief.

Dated: August 16, 1982.

[APPENDICES FOLLOW]

APPENDIX A

Certification in Support of Motion for Summary Judgment

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION—MIDDLESEX COUNTY
DOCKET No. L-41916-76
Civil Action

ASAR M. STEPAK,

Plaintiff,

vs.

COLLEGE OF MEDICINE AND DENTISTRY OF NEW JERSEY, RUTGERS MEDICAL SCHOOL and STATE OF NEW JERSEY,

Defendants.

MARY J. GREEN, being of full age and pursuant to R. 1:4-4(b) hereby certifies as follows:

1. I am the Admissions Officer for the College of Medicine and Dentistry-Rutgers Medical School ("CMDNJ-RMS"). I have been the Admissions Officer since July 1970 and have personal knowledge of and am responsible for the administration of the admissions process for CMDNJ-RMS, including the applications of Asar M. Stepak, the present plaintiff.

Appendix A

2. The specific academic requirements for admission to CMDNJ-RMS are as follows: 90 credits of academic work, exclusive of R.O.T.C. and physical education, including two years of biology, one year each of general chemistry, organic chemistry and physics, including lab in each. In addition, the Medical College Admissions Test (MCAT) is required. The CMDNJ-RMS catalog further states that admission is ". . . based not only on academic achievement, but also on a careful appraisal of personalities of the applicants for qualities which characterize practitioners of medicine."

3. Moreover, in reviewing the qualifications of an applicant, CMDNJ-RMS has always considered an applicant's entire background. In addition to academic performance, the Admissions Committee is interested in an applicant's patient care experience, leadership qualities, community activities and other subjective measures of a candidate's likelihood of becoming a skillful physician. Thus, admission to CMDNJ-RMS involves a variety of objective and subjective factors and academic performance as measured by undergraduate grades and MCAT scores is only one factor.

4. With regard to minority applications, CMDNJ-RMS has never used a quota for minority applicants. This is illustrated by the varying number of minority applicants accepted by the School over the last several years. Specifically, the class which entered in 1978 now consists of 18 blacks and five Hispanics. The class which entered in 1977 now consists of 17 blacks and seven Hispanics. The class which entered in 1976 now consists of 17 blacks and three Hispanics. The class which entered in 1975, the year for which Mr. Stepak applied, that class consisted of 18 blacks and four Hispanics. Thus, there has been a varying

number of minority applications accepted by the School for the last several years and the School has not established a quota for minority applicants.

5. However, in weighing the factors considered during the review process, such as academic performance and leadership potential, race is taken into consideration. For example, a black applicant who pulled himself or herself out of the ghetto may have demonstrated a level of perseverance and ability not reflected in raw test scores. Thus, consideration of race assists the Admissions Committee in evaluating the individual attributes of an applicant and selecting a student body with the most promise and diversity.

6. Moreover, the College, which is centered in a community with a large minority population and attempts to serve the needs of that population, has a strong commitment to affirmative action. The Board of Trustees has determined that there should be equal opportunity to admission without regard to, among other things, race or color. In that regard, it is instructive to note that in 1970 a task force of the Association of American Medical Colleges issued a report which noted that blacks constituted 2.2% of the country's doctors and 2.8% of the medical students. Their report further noted that among the factors causing that situation were financial and educational obstacles to minorities, including cultural bias in the MCAT. If academic performance as measured by test scores and MCAT scores were the sole criterion for acceptance, as demonstrated by Exhibit A, many minority applicants would be eliminated. Thus, consideration of race further assists the Admissions Committee in compensating for the cultural bias found by the Association of American Medical Colleges in MCAT scores.

Appendix A

7. It is plain to see that with only 108 available seats and over 2,400 applications, it is impossible to avoid rejecting qualified applicants. The goal of the Admissions Committee, therefore is to insure that all factors which relate to an individual candidate's qualifications to practice medicine are considered before a decision is made.

8. Asar M. Stepak applied for admission to CMDNJ-RMS for classes entering the academic year beginning in September, 1975.

9. For the academic year 1975, admission to CMDNJ-RMS was determined by an Admissions Committee, consisting of 19 members, 17 faculty members and two students.

10. For the 1975 academic year, the admissions process was conducted in the following manner. As Admissions Officer, I performed an initial evaluation of applications for admission and invited for interview those applicants who demonstrated evidence of high achievement in all categories. The remaining applications, approximately 2000 in number, were transmitted to members of the Admissions Committee for a determination as to which of those applicants should be interviewed. Mr. Stepak's application was among those which I selected for an automatic interview, and it was transmitted to the Admissions Committee for such an interview.

11. As to initial screening by the Admissions Committee of those who were not selected for an automatic interview, the applications forwarded to the Committee by me were first reviewed by one member of the Committee. At that point in the process, a member could recommend granting

an interview, holding an application for later interview or rejecting an application. If that member recommended an interview, then an applicant was automatically invited for an interview. On the other hand, if that member recommended against an interview, the application was reviewed by a second member of the Admissions Committee. If that member recommended an interview, the application was transmitted to the Chairperson of the Admissions Committee who decided whether an interview was to be granted. All interviews were conducted by members of the Admissions Committee.

12. As to the interview process, as noted earlier, applicants invited for an interview were interviewed by a member of the Admissions Committee. The interviewer attempted to assess both the objective and subjective variables considered by the Admissions Committee. Both the interviewer and the applicant had the option to request another interview if either was dissatisfied. Immediately after an interview, the interviewer was required to prepare a written evaluation of the applicant and that written evaluation became an additional document relied upon by the Admissions Committee in rating an applicant. Mr. Stepak was interviewed on January 19, 1975. On February 13, 1975, he requested a second interview so he could ". . . explain more fully certain aspects of my application." On February 21, 1975, Mr. Stepak received a second interview.

13. After an interview and after an application was complete, the Admissions Committee reviewed and ranked all applicants. Ranking was achieved in the following manner: three members of the Admissions Committee reviewed an application and rated it on a scale of one

to ten, with ten representing the top score. Those three scores were then averaged with a similar ranking assigned to an applicant by the interviewer and the result became the applicant's benchmark score. In 1975, the Admissions Committee initially decided to accept any New Jersey applicant with a benchmark score of 8.5 or higher. It further determined to reject any applicant with a benchmark score of 8.0 or lower. Later during the year, it became apparent that there were not enough positions in the class to accept all residents with a score of 8.5 or better, and, at that time, those who had not yet been accepted were placed on an alternate list. In 1975, no applicant with a score of less than 8.5 was accepted. In this regard, Mr. Stepak received a benchmark score of 6.0 and his application was rejected.

14. It is instructive to note that even if every minority applicant was removed from the accepted and alternate lists, the plaintiff would still not have been accepted. In 1975, there were 153 people placed on the alternate list. Of those people, 135 were nonminority and 18 were minority applicants. In addition to the applicants on the alternate list, there were 562 candidates who scored higher than the plaintiff, including 46 minority applicants, and who were rejected without placement on the alternate list. Thus, even if the College accepted no minority applicants, the plaintiff's application would not have been reached.

15. Thus, the procedures for admission to CMDNJ-RMS are intended to insure that the individual attributes of an applicant are given consideration. As noted earlier, not every qualified applicant can be accepted and the goal of the Admissions Committee is to insure that all relevant factors are considered before a decision is made.

Appendix A

16. I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements are willfully false, I am subject to punishment.

s/ _____

MARY J. GREEN

Dated: December 21, 1979

APPENDIX B

Order to Dismiss of the Superior Court of New Jersey, Middlesex County

(Filed—January 14, 1980)

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION—MIDDLESEX COUNTY

DOCKET No. L-41916-76

Civil Action

ASAR M. STEPAK,

Plaintiff,

vs.

RUTGERS MEDICAL SCHOOL, A DIVISION OF THE COLLEGE OF MEDICINE AND DENTISTRY OF NEW JERSEY, RUTGERS, THE STATE UNIVERSITY and THE STATE OF NEW JERSEY, jointly, severally and/or in the alternative,

Defendants.

The above-entitled matter having come on for trial on the 14th day of January, 1980, and neither the plaintiff or attorney appearing to prosecute the same:

It is, thereupon, on the 14th day of January, 1980, ORDERED that the above-entitled action be and same is hereby dismissed, and a copy of this Order shall be mailed to all counsel.

s/ _____

JOHN G. DEMOS, A.J.S.C.

NO. 81-2389

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1981

FILED
SEP 28 1982
ALEXANDER L. STEVAS,
CLERK

Asar M. Stepak, Appellant

v.

Rutgers Medical School-
a Division of the University
of Medicine and Dentistry of
New Jersey; the Board of
Trustees of the University
of Medicine and Dentistry
of New Jersey; the Department
of Higher Education of the
State of New Jersey and the
State of New Jersey; jointly,
severally, and/or in the alternative,
Appellees

ON APPEAL FROM THE NEW JERSEY STATE
SUPREME COURT

BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM

Asar M. Stepak
Appellant, Pro Se
1792 E. Walnut Rd.
Vineland, N.J.
08360

P.O. Box 436
Rio Grande, N.J.
08242

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ARGUMENT

I. Challenge to Constitutionality of State Statute Was Adequately Drawn In Question so as to Invoke this Court's Jurisdiction on Appeal

That a claim based upon 42 U.S.C. 2000c-8 in the within matter could only be viewed as intending a challenge to the "Medical and Dental Education Act of 1970", hereinafter referred to as the "Act", becomes apparent when considering that whereas the purpose of 42 U.S.C. 2000(c)et seq. was to enable the Attorney General to initiate suits against dejure segregation in public education and to enable the Dept. of HEW to allocate federal funds to public schools in a manner which promoted desegregation of de jure segregated schools it was not designed to expand the prexisting rights of individuals or create new rights against segregation or discrimination in public education, Swann v. Board of Education,402 US 1,16. Thus 42 U.S.C. 2000c-8 cannot be construed as conferring any greater individual rights against discrimination than that which existed previous to its enactment. In fact, the sole purpose of 42 U.S.C. 2000c-8 was to assure that none of the provisions of 42 U.S.C. 2000(c)et seq. diminished any prexisting rights to action

against discrimination. In this regard, a claim based on 42 U.S.C. 2000(c)-8 could then only be considered as an action directed against some prevailing condition or circumstance which as an direct outgrowth of the Dept. of Educ. policies pursuant to 42 U.S.C. 2000(c) et seq. and/or having the sanction of the U.S. Attorney General pursuant to 42 U.S.C. 2000c-6 diminished an individual's right to sue against discrimination. There is nothing in 42 U.S.C. 2000c-8 that prohibits discrimination in an absolute sense or guarantees a right to action against discrimination- such rights vest in the claimant by other statutes and constitutional principles. Thus, the phrasing of appellant's claim based upon 42 U.S.C. 2000c-8 in the pleading, count VII, paragraph 5, which states,

> "42 U.S.C.A. 2000c-8 vests a right in any person to sue for relief in any court against discrimination in public education. Based upon the aforesaid discrimination by the Admissions Committee, plaintiff herein exercises the right granted by 42 U.S.C.A. 2000c-8". ,

could only be reasonably construed as intending a direct challenge to the "Act" which was presumed to have been enacted pursuant to the provisions of 42 U.S.C. 2000(c) et seq. in order to counter what was deemed prexistent de jure segregation

at the State's medical schools.*

In a similiar vein, the phrasing of the claim based upon 42 U.S.C. 2000c-8 in the pleading could not be plausibly considered as a claim based upon a violation of individual rights since 42 U.S.C. 2000c-8 by itself does not vest in an individual an absolute right to trial nor right to action against discrimination. What 42 U.S.C. 2000c-8 does guarantee is that any condition or circumstance arising to stem the aftereffects of what was thought of as de jure segregation pursuant to the provisions of 42 U.S.C. 2000(c) et seq. does not diminish an individual's right to sue against discrimination in public education. Thus, the only absolute right vesting in 42 U.S.C. 2000c-8 is that nothing arise from 42 U.S.C. 2000(c) et seq. that would infringe upon rights to sue against discrimination in public education. In terms of individual rights 42 U.S.C. 2000c-8 does not guarantee a right to trial in a State court as might be inferred by a literal reading of the phrasing of Count VII, paragraph 5, of the

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* Whether the prevailing conditions at the State's medical schools could be plausibly described as dejure segregation previous to the "Act" is one of the substanstial constitutional questions this case poses.

pleading but does absolutely guarantee that no statutory enactment or educational directive stemming from 42 U.S.C. 2000 et seq. diminish the import of other rights to action. Thus, considering that previous to the "Act" Rutgers Medical School did not have the authority to diminish or deprive an aggrieved applicant's access to the courts, appellant's claim based upon 42 U.S.C. 2000c-8, viewed in the context of its phrasing in the pleading, clearly intended a constitutional challenge to the "Act" since it was only the "Act" that violated or diminished appellant's rights to trial. Even putting the impact of the "Act" aside [redacted] and postulating that Rutger's novel approach to race were the direct result of HEW directives pursuant to 42 U.S.C. 2000(c) et seq., such circumstance would not necessarily diminish appellant's right to trial but,rather, might pose an unsettled matter of law to be decided by a trial. In any event, claims based on 42 U.S.C. 2000c-8 could not be invoked in terms of guaranteeing the individual claimant an absolute right to trial but only a right to trial to the extent vested by other rights of action. If Rutgers' reliance on race as a result of

42 U.S.C. 2000(c) et seq. was such that other rights of action did not vest a right to sue, action to sue could not, therefore, be invoked under 42 U.S.C. 2000c-8. One may conclude, therefore, the the phraseology of appellant's claim based upon 42 U.S.C. 2000c-8 in the pleading, specifically, "...vests a right in any person to sue for relief..." and "...plaintiff herein exercises the right...", could only be reasonably construed as intending a direct challenge to the validity of the "Act".

In addition to a challenge to the "Act" being intended as early as the pleadings, reference was made to the challenged statute in appellee's trial court brief, (Aa18* to Aa21), and appellant's briefs in support of certification to the State Appellate Div., Appellate Div. Brief, see record below** and, also, by the trial court in its reinstatement order, (Aa8 to Aa9). Moreover, no reason appears that appellant should have assumed his claim based upon 42 U.S.C. 2000c-8 in the pleading inadequately posed a statutory challenge since the appellant had referred the matter to the N.J. Legal Ethics Committee, (Ab12), which discovered no inadequacy in the phrasing of the

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* Refers to Jurisdictional Statement.

** See Clerk's file, request for certification and transmission of the state court record, Aug. 24th, 1982 letters to Mr. Alexander Stevas and Mr. Stephen Townsend, and Sept. 7th, 1982 letter to Mr. Townsend.

claim which was prepared by former counsel, Mr. Jeffrey I. Baron, Gibbs v. Burke, 337 US 773,779. It appears unlikely that the Ethics Committee would have discerned no insufficiency in Mr. Baron's wording of the claim if the claim were not construed as posing a challenge to the "Act".

Even a determination that a challenge to the "Act" was not meritorious based upon 42 U.S.C. 2000c-8 such that appellant would have to rely on claims based on 42 U.S.C. 2000d, 20 U.S.C. 1681, etc.*, would not cause appellant's intendment to draw in question a challenge to the "Act" based upon the phrasing of 42 U.S.C. 2000c-8 in the pleading to be any less persuasive.

Thus,it would appear in accordance with rules of intendment, New York ex rel Bryant v. Zimmerman, 278 US 63,67, where it was established no specific form of words are essential in drawing in question a federal claim or statutory challenge, that appellant's presentment of his federal claims adequately intended a challenge to the "Act".

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* Appellant was barred from amending his complaint by the trial court's summary judgement, (Ab17).

II. The Constitutionality of the "Medical and Dental Education Act of 1970" Was Considered and Sustained by the State Court

The statement in the reinstatement order, (Aa8 to Aa9), " that this matter involves issues of public importance as to the admissions policies of a public agency", confirms the State court considered the constitutionality of the "Act" which the court construed as conferring agency status on the University of Medicine and Dentistry of N.J. and Rutgers Medical School. Were the constitutionality of the "Act" not considered by the State court it is unlikely that reinstatement could have been granted since any claim based upon individual rights would have been too severely prejudiced by the two year delay to justify reinstatement, Zaccardi v. Becker, 162 N.J. Super. 329. But even if reinstatement were still to be granted based upon the public importance of issues concerning the permissable use of racial factors in professional school admissions, the reinstatement order would have then had to been worded differently substituting the phrase, "admissions policies of a public agency", with phrasing to the effect, "extent race may be relied upon by a professional school". When, also, considering that the trial court subsequently granted Summary Judgement

to appellees, notwithstanding the unsettled factual dispute between litigants concerning the extent race was relied upon by the admissions committee, the phrasing in the reinstatement order, "admissions policies of a public agency", clearly points to reinstatement for purposes of adjudging the validity of the "Act".

Being that the State court may have had a propensity to stave off a constitutional challenge to the "Act" for reason that the "Act" has been deemed constitutionally valid for over 10 years, the State Supreme Court's denial to grant certification to the Appellate Div., (Aa15), could be understood in terms that in affirming the lower court it simply considered a challenge to the"Act" as patently frivolous. But were it not for the "Act" the State Supreme Court could not reasonably justify appellant's being deprived a trial. In other words, had the State Supreme Court not viewed a constitutional challenge to the "Act" as patently frivolous or , instead, decided to evade consideration of the "Act" altogether, then,it is inconceivable that it would decline appellant's petition for certification based upon the procedural abnormalities which barred abjudication of appellant's claims by the State court and/or substantial constitutional questions concerning the challenge to the "Act" itself.

As stated in Charleston Fed. Savings et al v. Alderson State Tax Commission, 324 US 182,186, "Where it appears from the opinion of the state court of last resort that a state statute was drawn in question as repugnant to the Constitution, and that the decision of the court was in favor of its validity, we have jurisdiction on appeal. For we need not inquire how and when the question of the validity of the statute was raised, when such question appears to have been actually considered and decided by that court." It is therefore contended that in the context of the proceedings of the State court and the denial of petition of certification by the State Supreme Court, that the State court sustained the constitutionality of the "Act" in a manner sufficient to invoke this Court's jurisdiction on appeal.

III. If Constitutionality of Statute Were Not Deemed as Having Been Determined by the State Court Than the State Court Must be Considered as Having Evaded the Statutory Challenge and Related Federal Constitutional Questions

If statutory challenge were not to have been deemed as sufficiently drawn into question or determined in the state court so as to invoke this Court's Jurisdiction on Appeal, than the state court's construence of its Summary Judgement Rule in allowing for dismissal of material issues must be considered as having barred adequate presentation of constitutional issues and/or permitted the state court to evade determination of a statutory challenge and related federal constitutional questions in direct violation of the Federal and State Constitutions, Fidelity and Deposit Co. of Maryland v. United States, 187 US 315; Chemical Foundation Inc. v. Universal Cyclops Stell Corp., 2 FRD 283; N.J. State Constitution of 1947, Article 1, paragraph 9, rights to jury trial-modeled after 7th Amendment to the Federal Constitution; Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J.67. Moreover, when it appears a state rule or procedure bars a litigant from adequately raising an issue as to a federal right, this Court will

consider the issue as adequately raised, Central Union Tel. Co. v. Edwardville, 269 US 190, 194-195.

On the other hand, to conclude that as a matter of law genuine issues of palpable injury are dismissable in Professional School Admissions merely because the alleged proponents* deny any such injury being within their capacity to impose would infringe the separation of powers principle in depriving rights of action of the claimant guaranteed by the Federal Constitution. Redefinition as to what is appellees' raw capacity to injure, clearly, can only be a legislative one since the law, all other factors being equal, presumes proclivity to injure uniformily distributed in the population. For the law to depict immorality or malice assymetrically embedded in the population in some way would allow it to presume guilt or innocence based merely upon the adversaries. As it is a question for the legislative branch of state government whether to grant a state entity an legal immunity by legislative enactment in the public interest, this court could only reverse the decision below if it concludes that the state court's consideration of a statutory act was not the premise for

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* A singular medical school admissions committee evaluating all student applicants.

its summary judgement ruling.

Clearly, then, any conclusion by this Court that in the within matter the summary judgement in the state court were not the result of the state court's sustaining the validity of the "Act" would not justify granting appellees' motion to dismiss or affirm for reason that:

1. It is the legislative and not judicial branch of government which is vested with the authority of repealing constitutional rights to legal action.
2. Any construence of the summary judgement rule as depriving or diminishing appellant's constitutional rights to action by its disregard for material issues in professional school admissions would be in direct controversion with previous decisions of this Court, Fidelity and Deposit Co. of Maryland v. United States 187 US 315 and subject to constitutional challenge on appeal.

Furthermore, if the summary judgement is not considered premised upon the constitutionality of the "Act" which deprived a litigant access to the courts, it would have to be viewed as obstructing the litigants presentation of federal claims through the normal sequence of events of amendment of complaint in controversion to summary judgement and development of issues

during trial. Thus, appellant would not be barred from invoking this Court's jurisdiction on appeal for reason of the state court's evasion of his claims. Plainly, therefore, this Court would appear precluded from granting appellee's motion to affirm or dismiss by virtue of the state court's evasion of the constitutional challenge through misapplication of procedures pertaining to its summary judgement.

There is little doubt that further trial court proceedings would have resolved any ambiguity of whether it was the state court's construence of the "Act" or some agency order sanctioned by the"Act" upon which the court's reinstatement order was based,* (Aa8 to Aa9). However, the court's ambiguity did not affect consideration of the constitutional issues since if the "Act" were deemed constitutional as construed by the state court so would the agency order or law the "Act" sanctioned or vice versa. Therefore, the ambiguity would not have been of any import except for condoning any lack of particulariness on the part of the appellant in his presentment of the statutory challenge. Thus, although the

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* There appears to be some ambiguity, albeit inconsequential to consideration of appellant's claims, whether the state court was referring to the "Act" or some agency order or law by the phrase "admissions policies of a public agency" in its reinstatement order.

summary judgement which barred further trial court proceedings would explain any lack of particularines in appellant's challenge to a specific statute, the determination of Rescue Army v. Municipal Court, 331 US 549 would not appear applicable to the present case as the constitutional questions presented are vivid not requiring further specification of the statute for their consideration.

The constitutional question posed is whether the "Act" and admissions laws of the University of Medicine and Dentistry of N.J. can be considered constitutionally valid when as construed by the state court its impact and effect is to annul specific federal statutes and suspend federal constitutional principles. The constitutional issues presented are clearly meritorious and substantial that if not requiring further review on appeal by this Court would certainly warrant summary reversal. Indeed, if appellees' assertions were true, that the within matter concerns issues of well settled law or that questions concerning the constitutionality of a statute were never presented or considered by the state court then not only would the state court's summary judgement ruling merit reversal but so too would the state's reinstatement order as it was precisely the public importance of issues pertaining to the challenge of the "Act" upon which reinstatement was based, see

point II, supra.

To sum up, if this Court considers that there is some question as to whether the state court considered the constitutionality of the "Act" prior to rendering summary judgement, then, clearly, the summary judgement ruling should be reversed as it is unlikely that the summary judgement could be justified without a statutory enactment redefining material issues in the present instance. Alternatively, if this court concludes a statutory redefinition of material issues may not be required in the special case of professional school admissions then that would in itself present substantial federal questions pertaining to the separation of powers principle and the constitutionality of the state's summary judgement rule subject to review by this court on appeal, In re Summers 325 US 561, Nashville C and St. L. Ry, Co. v. Wallace, 288 US 249, 259. However, on the other hand, if this Court concurs with that which is contended by the appellant, that the proceedings reveal that the state court considered and sustained the constitutionality of the "Act" and as it deemed a challenge to the "Act" as patently frivolous it denied appellant an opportunity to amend his complaint or develop his presentment during trial, then, the question before this Court is whether the

"Act" violates Federal Statutes and is repugnant to the Federal Constitution.

IV. Conclusion-Challenge to the "Act" Concerns Substantial and Meritorious Federal Questions

The administrative autonomy vesting in the University of Medicine and Dentistry of N.J. is similiar to the autonomy vesting in the State University-Rutgers University with the exception that the effect of the "Act" in creating UMDNJ as a public agency subdivision of the Board of Higher Education was that claims of discrimination by aggrieved applicants directed against UMDNJ or its subdivision, Rutgers Medical School, would not be heard in the first instance in a plenary manner by the State's trial courts. It is clear, then, that a major purpose of the "Act" was to deprive or limit rejected professional school applicants access to the courts since in attempting to promote Health Care and Medical and Dental Education within the state the administrative economy sought by the "Act" by consolidation of the various state run medical and dental colleges into a single state administrative agency could have been accomplished as equally as effective by consolidation into a single public medical school or a state administratively operated medical school without the effect of depriving aggrieved applicants of a trial de novo. Thus the "Act" granted the State a degree of immunity from claims of

discrimination in professional school admissions by suspending the applicability of various federal statutes and federal constitutional principles.

The question presented by the within matter is can the "Act" be valid as construed by the state court if it suspends federal constitutional priciple and federal law for the public interest it professes. It appears that the appellees' contention is that the "Act" was drawn under circumstances where suspension or disregard of federal law should be permitted so to appease appellees senses by making tolerable alleged injustices to which they refer. But, then, by whose senses do we determine what is justice? To say justice is to appease our senses in every instance would be to construct a system of laws based purely on instinct, but whose instinct? What the appellees appear to be suggesting,in this instance, is a judicial standard based on their instincts which they proffer as the law of the State. However, the appellees'approach is anarchistic to say the least as what more can we attribute to modern man's ability to advance technologically and to live in an orderly, civilized society then his capacity to recognize and acknowledge in himself

his own perceptual limitations. Should less be said of the appellees and their counsel?

However, no one will deny that newly concieved laws oftentimes promote the general good of our society. Indeed, the process of legislation conducted by representatives of the citizenry, duly elected and acting on their behalf is the process by which a democracy thrives. But, in a similiar vein, democracy requires basic principles and axioms which serve as the pillars supporting the basic freedoms it guarantees. Stifling the legislative process is no less distasteful as permitting it to flourish uncontrolled, especially, when legislation chips, cracks, and ungirdles the very pillars by which its democratic functions and legislative integrity depend. It is contended herein that the "Act" in such manner loosens and ungirdles our democratic pillars for by the democratic process it overeaches in placing undue strain and burden on the very constitutional principles by which it has been given license. It is by the judiciary in determining the constitutionality of legislation that we, through our democratic legislative processes, do not jeopardize our freedoms or become our own captures. If the judiciary allowed itself to be influenced by every political bandwagon or popular whim of the times, nearsighted as it may be, then

our pillars of democracy might be girded only by mire and our republic vulnerable to destruction from within. Regardless of how tangential the affected population may appear to be, to allow the suspension of minimal protections guaranteed by the Federal Constitution and Federal Law is surely a process by which our democracy is drawn nearer to subterfuge. That the undermining of a democracy may be accomplished gradually would not lessen the devastating impact of the final outcome. It is for these reasons that the "Act" which suspends the application of Federal Constitutional principles and Federal Law is self-defeating.

In conclusion, therefore, it is respectfully submitted that the appellant's state court challenge of the "Act" presents substantial and meritorious federal questions warranting summary reversal of the state court or plenary review by this Court on appeal.

Respectfully submitted,

Asar M. Stepak

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Asar M. Stepak,
Appellant, Pro Se